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IN THE

Supreme Court of the United States

October Term 1970
No. 203

DENNIS COUNCLE MCGAUTHA,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF

QUESTION PRESENTED

The Petition for Writ of Certiorari was granted solely as to Question 1 presented by the petition, which reads as follows:

> "'. . . Does California's practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of murder violate the Due Process Clause of the Fourteenth Amendment?'" (App. p. 267.) 398 U.S. 936.

Respondent does not accept petitioner's formulation of the question as an adequate characterization of California's practice or procedure but rather views the issue as being whether or not the standards which *are* provided under California law are constitutionally adequate.

STATEMENT OF THE PROCEEDINGS

A. History of the Case

In an information filed by the District Attorney of Los Angeles County, petitioner, together with William Rodney Wilkinson and Fannie Lue Smith, was charged in Counts I and II with robbery, a violation of California Penal Code section 211, and with being armed with deadly weapons at the time of the commission of the two robberies. (App. pp. 1-2.) In Count III petitioner, together with Wilkinson and Smith, was charged with murder, a violation of California Penal Code section 187. (App. pp. 2-3.) It was further charged in the information that petitioner had previously been convicted of four prior felonies in the State of Texas and that for each he had served a term of imprisonment in state prison: (1) theft over $50 (1943), (2) robbery (1943), (3) murder without malice (1948), and (4) robbery by assault (1952). (App. pp. 3-4.)

Separate counsel was appointed by the trial court to represent each of the three defendants. (App. p. 5.) Petitioner and Wilkinson each pleaded Not Guilty. (App. p. 5.) Defendant Smith's motion for severance was granted. (App. pp. 6, 34-35.) Petitioner was arraigned on the allegation of four prior felony convictions in the information and admitted each of them. (App. pp. 6, 35-37.) Twelve jurors were thereafter impaneled and sworn to try the cause. (App. p. 7.)

Upon conclusion of the guilt phase of the proceedings,[1] the jury deliberated and returned verdicts of

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[1]California Penal Code section 187 defines murder as follows: "Murder is the unlawful killing of a human being, with malice aforethought." California Penal Code Section 188 defines malice. Murder committed in the perpetration of certain

guilty against petitioner and Wilkinson as to each count, with the further finding that petitioner and Wilkinson were each armed at the time of the two robberies. (App. pp. 11-14.)

Thereafter the penalty phase of the proceedings relative to the murder count commenced before the same jury, the prosecution's only additional evidence consisting of documents establishing petitioner's four prior felony convictions. (App. p. 15.) Petitioner and defendant Wilkinson each testified on his own behalf (App. pp. 15-16), having previously not testified at the guilt phase (App. p. 8), and Wilkinson presented additional witnesses on his own behalf. (App. p. 15.) The jury was instructed as to the exercise of its discretion on the matter of penalty. (App. pp. 221-225.) Thereafter the jury deliberated and returned verdicts fixing the penalty at death as to petitioner and at life imprisonment as to defendant Wilkinson. (App. p. 30.)

Defendant Wilkinson's motion for new trial was denied. On Count I Wilkinson was sentenced to state prison for the term prescribed by law.[2] (App. pp. 31, 236.) Count II was merged into Count III (the murder count), on which Wilkinson was sentenced to state

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felonies, including robbery, is murder in the first degree. Cal. Penal Code § 189. First degree murder is punishable in the alternative by death or life imprisonment, "at the discretion" of the trier of fact, while second degree murder is punishable by imprisonment from five years to life. Cal. Penal Code § 190. California's procedure for bifurcated proceedings on the issues of guilt and penalty in capital cases is specified in California Penal Code section 190.1, which is set forth at pages 22-23, *infra.*

[2]The punishment for first degree robbery is imprisonment from five years to life. Cal. Penal Code §§ 213, 671.

prison for the term of his natural life.[3] (App. pp. 31, 236-237.) Wilkinson then filed notice of appeal. (App. p. 237.)

Petitioner's motions for new trial and for reduction of sentence were denied, and probation was denied. (App. p. 32, 243.) On Count I petitioner was sentenced to state prison for the term prescribed by law.[4] (App. pp. 32, 247.) Count II was merged into Count III (the murder count), on which petitioner was sentenced to death. (App. pp. 32-33, 247-248.)

Appeal to the California Supreme Court is automatic in capital cases. Cal. Penal Code §1239(b). In a unanimous opinion dated April 14, 1969, the judgments were affirmed in their entirety as to both petitioner and defendant Wilkinson. (App. pp. 249-265.) *People v. McGautha*, 70 Cal. 2d 770 (1969) [452 P. 2d 650]. On May 14, 1969, petitioner's Petition for Rehearing was denied by that court, one justice dissenting. (App. p. 266.) 70 Cal. 2d at 786 [452 P. 2d at 661.]

On June 1, 1970, this Court granted petitioner's motion for leave to proceed *in forma pauperis* and petition for writ of certiorari, limited to Question 1 presented by the petition. (App. p. 267.) 398 U.S. 936.

B. Factual Statement

(1) Guilt Phase of the Proceedings

The evidence received at the proceedings on the issue of petitioner's and defendant Wilkinson's guilt has not been included in the Appendix, and no issue relative to the guilt phase of the proceedings is before this

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[3] A prisoner sentenced to life imprisonment is eligible for parole after serving seven years imprisonment. Cal. Penal Code § 3046.

[4] *See* n. 2 *infra*.

Court. However, the California Supreme Court's summary of the evidence at the guilt phase is set forth below in order to aid this Court in evaluating the penalty in light of the offense for which it was imposed, and for the reason that the jury was instructed by the trial court that in arriving at a determination on the issue of penalty it "should consider all of the evidence received here in court presented by the People and defendants throughout the trial before this jury." (App. p. 222.)

"(a) *The Pon Lock Robbery* [Count I]: On February 14, 1967, at about 2:30 p.m., two men entered a market at 3772 Market Street in Los Angeles. One of the men asked the owner, Mrs. Pon Lock, for a pint of wine, which she gave him. He then pointed a gun at her and demanded money. At the same time the other man pointed a gun at a customer, Mrs. Jean Lim. After obtaining almost $300 the robbers left. Mrs. Lock chased them but they escaped.

"Both defendants were positively identified by Mrs. Lock and Mrs. Lim as the robbers. Mrs. Lock indicated that it was McGautha who confronted her and took the money, while Mrs. Lim testified that Wilkinson had kept her at bay with a gun. Sell Morgan, who lived near the Wall Street market, testified that Wilkinson was one of two men who parked in front of his house in a 1960 white Pontiac. Morgan indicated that a woman had remained in the car while the two men were gone, and that the men returned to the car and drove away immediately before Mrs. Lock emerged from her market shouting that she had

been robbed. Byron Shelton, a second-grade student, testified that he had seen Wilkinson in the store with another man on the afternoon of the robbery. Byron stated that after he left he saw the two men run from the store. Although he was unable to identify the second man, Byron did indicate that this person was carrying a bottle of wine when he left the store with Wilkinson.

"(b) *The Smetana Robbery* [Counts II and III]: Mrs. Lola Smetana testified that at 5:30 in the afternoon of February 14, 1967, she was in her store at 2151 Venice Boulevard in Los Angeles with her husband Benjamin and a customer. A woman entered the store, followed shortly by two men who asked for a bottle of wine. One of the men, whom Mrs. Smetana identified as Wilkinson, then pulled a gun and told her not to move. Mrs. Smetana identified McGautha as the other man, and stated that he also had a gun and was holding the arms of the customer across the store from where she and her husband were standing. Wilkinson then struck her on the side of her head and she fell to the floor. She heard a shot and her husband collapsed. She saw neither smoke nor a flash, and was unable to say which of the two men had shot her husband. Mrs. Smetana was also unable to remember whether the woman who entered immediately prior to the robbery had left before or after the beginning of the offense. Mrs. Smetana indicated some uncertainty as to which defendant had struck her and which defendant had stood further away with the customer. As a result of the shooting, Mr. Smetana died a few hours after the robbery.

"Miss Erma Dupree stated that McGautha, Wilkinson, Fannie Lue Smith, and she were good friends. On February 14 all four of them drove Fannie Lue's 1960 white Pontiac to the store on Venice Boulevard. Fannie Lue went into the store, followed by the defendants; Miss Dupree remained in the car. After an unstated period of time Fannie Lue returned to the car, followed hurriedly by the defendants. Miss Dupree did not hear a shot fired inside the market. Upon returning to Fannie Lue's house McGautha stated that he had robbed the market and shot a man. In order to convince Fannie Lue that he had done so he showed her an empty cartridge in the chamber of his gun. According to Miss Dupree, McGautha later explained that Wilkinson had hit a woman and that he, McGautha, had shot the man in question. A few days later, Miss Dupree testified, McGautha discovered a newspaper article about the robbery and killing. He stated that the two men being sought were Wilkinson and himself, but contended that the story exaggerated the amount of money they had obtained from the robbery. On cross-examination by defendant McGautha's counsel, Miss Dupree admitted that she had been promised immunity from prosecution and that at the time of the robbery Wilkinson was her boyfriend.

"John Watkins testified that he had driven the defendants from Los Angeles to Bakersfield about one week after the robbery. He indicated that during the trip McGautha stated that a man had been killed in order to save Wilkinson's life. Watkins gave inconsistent testimony as to whether

McGautha admitted the shooting, but he was certain that one of the defendants had made such an admission.

"Kaye Druley, a police ballistics expert, testified that the bullet that killed Mr. Smetana had been fired from the .38 revolver introduced as People's exhibit No. 3. Miss Dupree testified that McGautha's gun resembled exhibit No. 3, but Mrs. Lock stated that the gun used by Wilkinson resembled the .38 in question. Mr. Druley further indicated that the fatal shot might have been fired from either of the points in the store where Mrs. Smetana stated the robbers were standing when her husband was shot." (App. pp. 250-252.)

People v. McGautha, 70 Cal. 2d 770, 773-775 (1969) [452 P. 2d 650, 652-653].

(2) Penalty Phase of the Proceedings

(*a*) *Evidence Introduced by the Prosecution*

The jury having returned verdicts of guilty as to both petitioner and defendant Wilkinson on each of the three counts charged in the information, further proceedings were had as to both defendants on the issue of penalty relative to the murder charge. (App. p. 80.)

The prosecution waived opening statement to the jury, presented no additional testimony, and offered only one item of physical evidence (People's Exhibit 27) consisting of a file of judgments, photographs, and fingerprints establishing petitioner's four prior felony convictions and terms of imprisonment in Texas for theft over $50 (1943), robbery (1943), murder without malice (1948), and robbery by assault (1952). (App. p. 81; *see also* App. pp. 3-4, 35-37.)

(b) Evidence Introduced by Defendant Wilkinson

Defendant Wilkinson testified on his own behalf at the penalty phase of the proceedings (App. pp. 84-135), having not testified at the guilt phase. (App. p. 8.) Wilkinson testified that he was twenty-six years of age at the time of trial, that he was born in Greenfield, Mississippi, of a Causasian father and a Negro mother, and had four sisters and one brother. When he was twelve or thirteen years of age his father died, and he had to leave school to seek work to support his mother. Wilkinson had no specific skills. (App. pp. 84-85.)

At age eighteen he enlisted in the Army but after five or six months received an Honorable Discharge because of his low I.Q., which was in the eighties. (App. pp. 85-86.) Thereafter he returned to Mississippi, where he worked at a service station to support his family. He then was arrested for his involvement with some bad checks cashed by a girl friend of his, spent a couple months in jail while awaiting trial, but ultimately was not convicted. (App. pp. 86-87, 102.)

Thereafter, in 1960, Wilkinson went to California, where he worked as a dishwasher and lived for two years with Reverend Charles Davis, a Baptist minister, whose church he attended regularly until the time of his arrest on the present charges. During this period of time Wilkinson worked as a baker and then at a picture framing establishment, sending money to his family in Mississippi. (App. pp. 87-88.) Then in 1965 Wilkinson was shot in an alley by a gang of men, apparently for no reason, and was hospitalized for a week. (App. pp. 88-89.)

Around Christmas of 1966, Wilkinson met Erma Gean Dupree and eventually met several other persons, including petitioner, through Mrs. Dupree. (App. pp. 89-90.) Wilkinson was living with Mrs. Dupree at the time and needed money to pay their rent. He and Mrs. Dupree moved into an apartment which petitioner shared with one Fannie Lue Smith; Wilkinson lost his job, and despite his reluctance he agreed to engage in robberies with petitioner to raise money. (App. pp. 90-92.) Wilkinson acquired an old .32 automatic pistol, which was missing the clip and part of the handle. He never fired the weapon. (App. p. 93.)

On February 14, 1967, one week after moving into petitioner's apartment, petitioner and Wilkinson held up the Pon Lock market (Count I). Wilkinson was unarmed. (App. pp. 91, 95.)

Later that day petitioner and Wilkinson held up the Smetana store (Counts II and III.) Petitioner and Wilkinson were each armed. While Wilkinson was holding a customer, petitioner hit Mrs. Smetana, fired a shot, and told Wilkinson to leave the store. (App. pp. 98-100, 114, 133.) Petitioner customarily kept the murder weapon in the glove compartment of his (petitioner's) Cadillac. (App. p. 135.)

Wilkinson called Edward Brimmer, a Los Angeles police officer, as a witness on his behalf. Officer Brimmer testified that when he had worked in an undercover capacity, he had seen the murder weapon at petitioner's home on numerous occasions. (App. pp. 136-138.) On one such occasion, petitioner demonstrated to Officer Brimmer and another person how quickly he could draw the weapon from his waistband. (App.

pp. 138, 140.) This incident took place in 1964. (App. p. 139.)

Wilkinson also called one of the investigating officers in the case, Sergeant Richard Sullivan, as a witness on his behalf. (App. p. 148.) Sgt. Sullivan testified that Wilkinson had answered all questions posed to him by the police. (App. p. 151.)

Several character witnesses testified on Wilkinson's behalf, including Reverend Davis (App. p. 145), Mrs. Iola Henry, formerly Wilkinson's common law wife (App. pp. 141, 144), and Laban Bolling, a security guard. (App. p. 156.) They testified that until Wilkinson began to associate with petitioner and Mrs. Dupree, he had a good reputation, regularly attended church, and did not have a violent nature. (App. pp. 142-143, 145-147, 157-158.)

(*c*) *Evidence Introduced by Petitioner*

The sole evidence offered by petitioner at the penalty phase of the proceedings was his testimony on his own behalf (App. pp. 159-194), petitioner having not testified at the guilt phase. (App. p. 8.) Petitioner testified that he was forty-one years of age at the time of trial, that he had a "bad arrest record," but that it was defendant Wilkinson rather than petitioner who had struck Mrs. Smetana on the head and murdered Mr. Smetana. (App. pp. 159-160,) According to petitioner, after the Pon Lock robbery Wilkinson had said he (Wilkinson) "was afraid of the .32 automatic because it would hold only one shell in the chamber and then if he was ever in trouble he would like to have more of a defense, and so at this time we traded guns," petitioner giving his .38 caliber revolver to Wilkinson to use in the Smetana holdup. (App. pp. 160-

161.) Petitioner did not know whether the .32 automatic would function. (App. p. 186.) He denied ever having told anyone that he (petitioner) had shot Mr. Smetana. (App. pp. 164-165, 190-191.)

Petitioner testified that he was born in New Orleans and was raised in Houston, that his parents separated when he was four years of age, and that he had a brother and a half brother and a half sister. (App. p. 164.) Petitioner had been in military service and received an Honorable Discharge in 1942 after his foot was fractured by the fall of a machine gun. (App. pp. 161-162.)

Petitioner admitted to being convicted of robbery in 1943, serving a term of imprisonment therefor until 1946, and working in a produce company until 1948, when he had a fight with a man, killing him and serving a term of imprisonment therefor until 1949. Petitioner subsequently returned to his job at the produce company, where he worked until 1952, when he was convicted of robbery, serving a term of imprisonment therefor until 1958. (App. pp. 162-163.) Although he pleaded guilty to the two robberies, petitioner testified that he did not "actually commit" them. (App. pp. 174-175.)

Upon his release from prison in 1958, petitioner moved to California, where according to his testimony he worked as a chauffeur, man servant, and personal valet for Max Factor's of Hollywood, Foreign Ad Film Service, Judge Alfred Gitelson of the Los Angeles Superior Court, and Mr. and Mrs. Peter Lawford, where he "served ex-President John F. Kennedy, Robert Kennedy, Edward Kennedy, Ethel Kennedy, Sergeant Shriver, Mrs. Shriver." (App. pp. 164, 176.) Pe-

titioner was also employed as a theater manager, after which he claimed to have suffered a nervous breakdown and a coronary heart attack. (App. p. 164.)

Petitioner denied having ever demonstrated his ability to draw a gun from his waistband and denied knowing Officer Brimmer. (App. pp. 174, 178.)

On cross-examination, petitioner admitted pleading guilty in 1964 to carrying a concealed (.38 caliber) weapon. (App. p. 177.) However, after his arrest on the present charges and after being advised of his constitutional rights, he told the investigating officers that he had never had a .38 caliber revolver and that he had nothing to do with the Smetana robbery. (App. pp. 180-181.) Petitioner netted some $20 from the Smetana robbery. (App. p. 192.)

SUMMARY OF ARGUMENT

The issue in the case at bar is whether the standards provided by California law, to guide the jury in the exercise of its discretion in fixing the punishment in capital cases, are constitutionally adequate under the due process clause of the Fourteenth Amendment.

California Penal Code section 190.1 provides for bifurcated proceedings on the issues of guilt and penalty, with addition of a third phase between these two stages where the defense of insanity is raised.

The jury is instructed that the question whether the defendant is "fit to live," *Witherspoon v. Illinois,* 391 U.S. 510, 521 (n.20), lies within the "judgment, conscience, and absolute discretion of the jury." (App. p. 223.) This is an even-handed discretion, with no presumptive penalty of death and no requirement that a verdict fixing the punishment at life imprisonment be

founded upon a finding of mitigating circumstances. *People v. Green*, 47 Cal. 2d 209, 230-232 (1956) [302 P. 2d 307, 321-322].

The jury is told that it "should consider all of the evidence received here in court" and that it "may consider all evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court." The jury is cautioned, "the authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you." It is also informed that "the law does forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling." (App. pp. 221-223.) *See* California Jury Instructions—Criminal, No. 8.80 (3d ed. 1970).

A proper evaluation of these standards requires that they be viewed in conjunction with the multitude of rules governing the conduct and review of capital cases in California. Among the special procedures fashioned to protect defendants in capital cases are those which admit all competent, relevant evidence on the issue whether the defendant is "fit to live," permitting the jury in accordance with modern penological views to judge the accused and not merely the crime. Yet evidence of other offenses must be proved beyond a reasonable doubt, and unduly inflammatory evidence is excluded. Similar safeguards exist with the respect to the scope of argument permitted counsel on the issue of penalty.

Multifaceted review of every jury verdict imposing the death penalty is afforded by the trial judge, the

California Supreme Court, and the Governor each having—and often exercising—discretion to supplant the jury's decision. The automatic review provided by the California Supreme Court is particularly stringent, involving a duty on the part of the court to comb the record for reversible error even where the defendant does not raise a claim of error and even where he wishes to dismiss his appeal. Furthermore, a very strict rule of prejudicial error, making any "substantial" error *per se* cause for reversal, is applicable exclusively to the penalty phase of a capital case. During the last three years, 69% of the 59 direct appeals in capital cases have resulted in the death penalty, conviction, or both being set aside. California also provides numerous post-appellate procedures for additional review.

In conjunction with the foregoing rules, the flexible guidelines given the jury at the penalty phase of a capital case are constitutionally preferable to the fixed standards elsewhere proposed. The California standards apprise the jury of the proper factors to consider in arriving at a determination on the issue of penalty, and they afford defense counsel the easy task of selecting for presentation to the jury any and all favorable or mitigating evidence concerning the offense and relating to his client's life background.

To the extent humanly possible, California's procedure precludes an arbitrary exercise of discretion on the part of the jury. Its flexible standards are those most suited for the jury's task which, in fixing the punishment in a capital case, is "to maintain a link between contemporary community values and the penal system." *Witherspoon v. Illinois,* 391 U.S. 510, 519 (n.15). This is borne out by examination, individually and collec-

tively, of the capital cases which have passed through the California system. Significantly, every single one of the capital cases reviewed by the California Supreme Court in the last five years included one or more of the aggravating circumstances enumerated in the fixed standards cited in n.26, *infra*. *See* Appendix to Respondent's brief.

Moreover, petitioner and *amici curiae* N.A.A.C.P. *et al.* have failed to demonstrate that any system of fixed criteria is workable, let alone constitutionally compelled. In fact there is substantial authority indicating that such arbitrary formula-determination would be disadvantageous to capital defendants.

> *See State v. Johnson,* 34 N.J. 212 (1961) [168 A. 2d 1, 10-11];
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> Royal Commission on Capital Punishment 1949-1953 Report, 173-177, 195.

Interestingly enough, the jury's decision that petitioner should suffer the death penalty would not have been altered by any conceivable application of the various fixed standards which have been propounded. All indications afforded by the record impel the conclusion that the jury acted on constitutionally permissible grounds, rather than arbitrarily, in fixing petitioner's punishment at death and his co-defendant's at life imprisonment.

The *voir dire* examination of the twelve jurors affirmatively reflected their willingness to decide the issue of penalty on the evidence received in court and the law given them by the trial judge, and to disregard racial considerations, petty biases, and personal preconceptions. The opening statement of counsel and the

closing arguments provided further direction to the jurors as to the proper exercise of their discretion.

Most significantly, the evidence before the jury indicates that it was discriminating and not discriminatory in distinguishing between the two defendants. Petitioner was a likely candidate for the death penalty under any imaginable standards, having been the "triggerman" during the fatal robbery, fifteen years senior to his codefendant, and previously convicted of four felonies, one of them another murder.

Thus the record in petitioner's case affords no basis for the claim that the absence of fixed standards on the matter of punishment deprives a defendant in a capital case of due process of law. It is submitted that the standards which California provides to guide the jury in the exercise of its discretion comport with the Fourteenth Amendment's guarantee of due process of law, and that moreover the record affirmatively indicates that petitioner received a trial consistent with the highest standards of fairness.

PRELIMINARY STATEMENT

Petitioner contends that his sentence of death is unconstitutional because the procedure by which the death penalty is imposed under California law does not comport with the Fourteenth Amendment's guarantee of due process of law. More specifically, it is petitioner's position that California Penal Code section 190.1 is unconstitutional because it authorized the procedure by which the issue, whether petitioner should be sentenced in the alternative to life imprisonment or death, was submitted to the jury's discretion uncontrolled by fixed standards, the jury having previously found petitioner guilty of murder in the first degree.

Petitioner's argument is addressed almost exclusively to the wording of section 190.1 (*see* pages 22-23, *infra*) and the wording of the standard jury instruction based upon that statute and given in the present case. (App. pp. 221-221; see pages 26-29, *infra.*) However, the statute and the instruction, discussed herein in detail, comprise only the skeletal outline of what was submitted to the jury as the basis for its determination on the issue of punishment.

Petitioner's concentration on the formal guidelines given to the jury, and his minimal reference to the evidence and arguments upon the evidence which make of this case a reality, have led him to treat the procedure by which his punishment was fixed as if it were an abstract metaphysical exercise conducted in a factual vacuum. Petitioner has failed to consider the practical operation of the rules which clothed them with flesh and blood in the case at hand.

Not only is petitioner's approach unrealistic, but it runs afoul of this Court's basic precept that a statute be judicially considered as it pertains to the specific case and the particular litigant before the Court:

> ". . . This Court, as in the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to an-

ticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' [Citation.] Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. [Citations omitted.] . . ."

United States v. Raines, 362 U.S. 17, 21.

See also In re Cregler, 56 Cal. 2d 308, 313 (1961) [363 P. 2d 305, 307-308].

In order to present the full context in which petitioner's penalty was fixed, and therefore the full context in which the penalty determination must be reviewed, the specific proceedings at petitioner's trial must be considered in some detail. However, so that the proceedings below can be properly evaluated, it is essential first to review the judicial decisions which interpret section 190.1 and establish a body of rules peculiar to the conduct of the penalty phase of a capital case in California, and to examine the practical operation of the system which provides subsequent judicial and executive review of such proceedings.

ARGUMENT

I

The Special Procedure in California Law Applicable to the Penalty Phase of a Capital Case, Including Instruction to the Jury as to the Proper Factors to Consider in Arriving at a Penalty Verdict, Is Constitutionally Permissible and Fairer to Both the Defense and the Prosecution Than Would Be Any Formula Standards

A. Even-Handed Discretion Is Conferred Upon the California Penalty Jury by Statute and Standard Instruction

California Penal Code section 190.1, which sets forth the current procedure for the separate proceedings on the issue of penalty that take place in capital cases in California, has been in effect since 1957 and governed the proceedings below.

In 1850, the year California became a State, the Legislature decreed that "The punishment of any person convicted of the crime of murder shall be Death." Cal. Stats. 1850, ch. 99, §21. Six years later the statute was amended to provide for two degrees of murder[5] and a mandatory penalty of death for murder in

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[5]The statute relating to degrees of murder presently reads: "All murder which is perpetrated by means of *a destructive device or explosive,* [elsewhere defined in the Codes], poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288 [sexual acts upon a child under the age of fourteen years], is murder of the first degree; and all other kinds of murders are of the second degree." Cal. Penal Code §189 (italicized words added August 19, 1970, as an urgency measure. Cal. Stats. 1970, ch. 771, § ....). The elements of murder are defined in sections 187 and 188. *See* n.1, *infra,* pp. 2-3. Manslaughter, voluntary and involuntary, is defined in section 192. The punishment for second degree murder and manslaughter is set forth in sections 190 and 193.

Under the felony-murder rule, a defendant is criminally responsible for the death of anyone caused by the defendant or

the first degree. Cal. Stats. 1856, ch. 139, §2. The law with respect to the punishment for murder remained basically unchanged when California enacted its Penal Code in 1872, the provision in question being codified as section 190. Cal. Penal Code Annot. §190, Legislative History (Deering 1960).

In 1874 section 190 was amended to read, "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same. . . ." Cal. Penal Code Annot. §190, Legislative History (Deering 1960).[6] An 1874 decision of the California Supreme Court established that section 190 was to be read as providing for the death penalty in capital cases, except where the jury found extenuating circumstances and expressly recommended life imprisonment. *People v. Welch*, 49 Cal. 174, 179-180 (1874). This remained the law until 1956, when the *Welch* decision was repudiated in *People v. Green*, 47 Cal. 2d 209, 232 (1956) [302 P. 2d 307, 322].

The year following the decision in the *Green* case, section 190 was amended to read:

> "Every person guilty of murder in the first degree shall suffer death, or confinement in the state

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his accomplice in furtherance of the commission of the specified felony, even where the defendant is an unarmed accomplice. *People v. Floyd*, 1 Cal. 3d 694, 707-709 (1970) [464 P.2d 64, 71-72]; *People v. Washington*, 62 Cal. 2d 777, 782-783 [402 P. 2d 130, 133-134]. However, it is very unusual for the death penalty to be imposed upon a defendant who did not commit the actual killing. *See* Special Issue, *A Study of the California Penalty Jury in First-Degree Murder Cases*, 21 Stan. L. Rev. 1297, 1348 (n.131), 1398 (1969).

[6]A 1921 amendment added to section 190 the proviso that the death penalty was not to be imposed upon any person for murder committed before such person reached the age of eighteen years. *Id.*

prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined *as provided in Section 190.1*, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life." (Emphasis added.)

The new section 190.1, added in 1957,[7] instituted the procedure for a bifurcated trial on the issues of guilt and penalty.[8] Section 190.1 currently provides:

"The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evi-

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[7]A 1959 amendment made certain changes relative to the issue of sanity and further added the third sentence in section 190.1, dealing with the admissibility of evidence on the issue of penalty. Prior to the 1959 amendment, evidence on the issue of penalty was limited to "any evidence concerning the commission of the crime admissible in the trial determining the guilt of the defendant." Cal. Penal Code Annot. §190.1, Legislative History (Deering 1960).

[8]California was the first State to provide for separate trial of these issues in capital cases. *See* Comment, *The California Penalty Trial*, 52 Cal. L. Rev. 386, 387 (1964). Since then Connecticut, Georgia, New York, Pennsylvania and Texas have adopted this procedure. *See* Special Issue, *A Study of the California Penalty Jury in First-Degree Murder Cases*, 21 Stan. L. Rev. 1297, 1433-1438 (1969), and Ga. Gen'l Assembly, 1970 Sess., H.B. No. 228. *See also* Study Draft of a New Federal Criminal Code §3604 (National Commission on Reform of Federal Criminal Laws, 1970); Model Penal Code §210.6 (Proposed Official Draft, 1962).

dence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

"In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury."

In repudiating the doctrine of the *Welch* case, *supra*, that the law fixes death as the punishment for first degree murder in the absence of extenuating circumstances justifying a jury verdict of life imprisonment, the court in *Green* stressed that the jury's discretion is unimpeded by any need to find mitigating circumstances. *People v. Green, supra*, 47 Cal. 2d 209, 230-232 (1956) [302 P. 2d 307, 321-322]. The court held: "The law, as hereinabove emphasized, indicates *no preference whatsoever* as between two equally fixed alternatives of penalty." (Emphasis added.) *Id.* at 231 [302 P. 2d at 322]. *Cf.* 18 U.S.C.A. §1111.

Under sections 190 and 190.1 the discretion conferred by the Legislature on the jury (or on the trial court, where jury trial is waived) is absolute as to the decision whether to fix the penalty for first degree murder at life imprisonment or death, and a trial judge is not authorized to innovate any rule limiting the exercise of this discretion. The jury need not find ameliorating circumstances to impose life imprisonment, nor aggravating circumstances to impose the death penalty. *In re Anderson*, 69 Cal. 2d 613, 622 (1968) [447 P. 2d 117, 124].

However, the trial court may instruct the jury as to the kinds of factors that they may consider on the question of penalty, so long as the jury are not instructed to exclude factors which they are entitled to consider or to include factors which lie outside the scope of their proper discretion.

People v. Polk, 63 Cal. 2d 443, 451 (1965) [406 P. 2d 641, 646];

People v. Morse, 60 Cal. 2d 631, 653 (1964) [388 P. 2d 33, 47].

Capital cases have been reversed where the trial court erroneously has instructed the jury at the conclusion of the penalty proceedings that they may not be influenced by sympathy or pity for the defendant.

People v. Bandhauer, 1 Cal. 3d 609, 618-619 (1970) [463 P. 2d 408, 416];

People v. Stanworth, 71 Cal. 2d ...., ..., 71 A. C. 858, 880-881 (1969) [457 P. 2d 889, 904].

The scope of the jury's discretion on the matter of penalty has been thus interpreted by the California Supreme Court:

". . . Section 190 does not impose the death penalty, leaving discretion with the jury to substitute a lesser penalty; it imposes neither death nor life imprisonment, but *with a perfectly even hand presents the two alternatives to the jury.* The Legislature, perhaps because of the very gravity of the choice, has formulated no rules to *control* the exercise of the jury's discretion." (Emphasis added.)

People v. Riser, 47 Cal. 2d 566, 575 (1956) [305 P. 2d 1, 7].

However, the *Riser* opinion also made it clear that the jury's discretion is not to be exercised in an arbitrary manner:

"We did not suggest in the Green case, however, that section 190 did not require of the jurors a meaningful choice between these alternatives, a choice fundamentally based on the evidence and made during and not before deliberation on the verdict. The statute calls for the exercise of a legal discretion, not for the unswerving application

of views formulated before trial that will compel a certain result no matter what the trial may reveal." *Id.* at 575 [305 P. 2d at 7].

"The determination of penalty, . . . like the determination of guilt, must be a rational decision."

People v. Love, 53 Cal. 2d 843, 856 (1960) [350 P. 2d 705, 713].

Thus defense counsel is permitted broad leeway in examining prospective jurors to ascertain whether their state of mind would permit them to exercise their discretion in an impartial and unbiased manner on the issue whether the defendant is fit to live.

People v. Mitchell, 61 Cal. 2d 353, 366-367 (1964) [392 P. 2d 526, 534-535];

People v. Hughes, 57 Cal. 2d 89, 94-97 and nn. 1, 2 (1961) [367 P. 2d 33, 35-37].

The *voir dire* examination conducted on this issue by defense counsel in the instant case is a good example of the broad range permitted. (*See* App. pp. 38-39, 44, 54, 62, 65-66.)

It is standard practice in California to instruct the jury in the words of Penal Code section 190.1 at the conclusion of the penalty phase in a capital case, and the jury was so instructed in the present case:

"Ladies and gentlemen of the jury: It now becomes my duty to instruct you in the law that applies to this phase of the trial and it is your duty to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The

authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

"Now, both the People and the defendants have a right to demand, and they do demand and expect, that you will conscientiously and reasonably consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

"At the first phase of the trial you were given instructions concerning the law applicable to this case. It will not be necessary to repeat at this time those instructions. With one notable exception those instructions are applicable to this phase of the trial as well and you are to be guided by them. The exception is that in this part of the trial the law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; however, the law does forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling.

"The defendants in this case have been found guilty of the offense of murder in the first degree, and it is now your duty to determine which of the penalties provided by law should be imposed on each defendant for that offense. Now, in arriving at this determination you should consider all of the evidence received here in court presented by the People and defendants throughout the trial

before this jury. You may also consider all of the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court. However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand.

"Evidence of other crimes alleged to have been committed by a defendant may not be considered as evidence in aggravation unless proved beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, that such other crimes have been committed by a defendant.

"It is the law of this state that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury. If you should fix the penalty as confinement for life, you will so indicate in your verdict. If you should fix the penalty as death, you will so indicate in your verdict. Notwithstanding facts, if any proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience,

and absolute discretion. That verdict must express the individual opinion of each juror.

"Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed.

"In this case you must decide separately the question of the penalty of each of the two defendants. If you cannot agree upon the penalty to be inflicted on both defendants, but do agree as to the penalty of one of them, you must render a verdict as to the one on which you do agree.

"You shall now retire to the jury room. As I have indicated, in order to return a verdict it is necessary that all twelve of the jurors agree to the decision. As soon as all of you have agreed upon a verdict, you shall have it signed and dated by your foreman and then return with it to this room." (App. pp. 221-223.)

The instruction given included the substance of that denoted Number 8.80 in California Jury Instructions—Criminal (3d ed. 1970),[9] an instruction which must

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[9]The instruction is denoted Number 306.1 (New) in California Jury Instructions—Criminal (Rev. ed. 1958). The instructions compiled in the cited volume are to be given in California trial courts unless the trial judge " 'finds that a different instruction would more adequately, accurately or clearly state the law.' " *Id.* (3d ed. 1970) at p. xii, quoting Standards of Judicial Administration Recommended by the Judicial Council of the State of California, Section 5.

be given *sua sponte*, in the absence of any request therefor. *Id.*, 577, 584.

See also People v. Nye, 71 Cal. 2d ...., ..., 71 A.C. 376, 389-390 (n.5) (1969) [455 P. 2d 395, 402-403];

People v. Durham, 70 Cal. 2d 171, 197-198 (n.23) (1969) [449 P. 2d 198, 215].

There are special instructions, applicable solely to the penalty phase of a capital case, which must be given on the court's own motion. These include the standard instruction, which comprised part of the instruction in the present case (App. p. 222), that the jury may consider evidence of *other* crimes only when the commission of such crimes is proved beyond a reasonable doubt, California Jury Instructions—Criminal (3d ed. 1970), No. 8.81, and that the testimony of an accomplice to such other crimes must be corroborated. *People v. McClellan*, 71 Cal. 2d ...., ...-...., 71 A.C. 831, 841-846 (1969) [457 P. 2d 871, 877-881].

A defendant in a capital case is also entitled under California law to have the trial court instruct the jury *sua sponte* at the conclusion of the penalty phase as to the general scheme of the parole system but admonishing them not to consider the matter of eligibility for parole in determining the defendant's punishment. The purpose of this instruction, first set out in *People v. Morse*, 60 Cal. 2d 631, 648 (1964) [388 P. 2d 33, 43-44], is to remove from the jury the temptation to consider the possibility that the defendant might be prematurely paroled and to be influenced, for that reason, toward returning a verdict of death. *People v. Varnum*, 70 Cal. 2d 480, 489-491 and n.7 (1969) [450 P. 2d 553, 558-560]. This standard instruction (No.

8.82, California Jury Instructions—Criminal (3d ed. 1970)) was also given in the present case. (App. pp. 224-225.)

In addition to the foregoing instructions pertaining to the penalty phase of a capital case, there are others which, where applicable, are mandatory at the guilt phase of a murder case (involving, *e.g.*, diminished mental capacity and specific intent) or mandatory under certain circumstances regardless of the nature of the offense. *See* California Jury Instructions—Criminal 571-586 (3d ed. 1970). The trial judge's duty to give these various instructions on his own motion is one of several important safeguards against the jury's exercising its discretion in an arbitrary manner in determining the matter of penalty in a capital case.

B. All Competent, Relevant Evidence Permitting the Jury to Judge the Accused, and Not Merely the Crime, Is Admissible on the Issue Whether the Defendant in a Capital Case Is Fit to Live

The jury's function under California law at the penalty phase of a capital case has been thus defined by the California Supreme Court:

> "The jury decides whether the individual should be permitted to live upon the basis of a complete and careful analysis of that person as a human composite of emotional, psychological and genetic factors. The jury looks at the individual as a whole being and determines if he is fit to live. . . ."
>
> *People v. Morse*, 60 Cal. 2d 631, 647 (1964) [388 P. 2d 33, 43.]
>
> *See also Witherspoon v. Illinois*, 391 U.S. 510, 521 (n.20).

With the objective of enabling the jury to exercise the foregoing function in an informed and meaningful manner, the California Legislature in 1959 expanded the scope of evidence admissible on the issue of penalty by amending Penal Code section 190.1 to provide in relevant part:

> ". . . Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. . . ."

Prior to the 1959 amendment, evidence on the issue of penalty had been limited to "any evidence concerning the commission of the crime admissible in the trial determining the guilt of the defendant." Cal. Penal Code Annot. §190.1, Legislative History (Deering 1960).

This statutory expansion of the scope of permissible evidence on the issue of penalty appears to have been a direct reaction to a suggestion by the court in *People v. Friend*, 47 Cal. 2d 749 (1957) [306 P. 2d 463], wherein the reasons in support of a broader standard of admissibility were set forth:

> "The character and scope of evidence pertinent to punishment which should be received in a case wherein the jury is required to fix the penalty, is a subject which could well receive legislative attention. This state has long since accepted the view (as recognized and implemented by the indeterminate sentence laws and other acts) that, generally speaking, punishment should be fitted to the perpetrator of the crime, not merely the crime. In tailoring punishment for most offenders the controlling agency has the benefit of a com-

plete study of the person. In the whole life story the particular crime is an incident, a controlling one for the time being, probably, but only one of many which the board considers in reaching its ultimate conclusion. It seems, therefore, incongruous that in a case of first degree murder the jury conceivably may be given the responsibility of selecting life imprisonment or death as punishment, but in making that determination may be denied the full measure of enlightenment which for less drastic punishments is available to the administrative board. It appears that in this respect the law, when and if so applied, continues the outmoded view that punishment must inexorably fit the crime, not the offender." *Id.* at 763 (n.7) [306 P. 2d at 471-472.]

Despite the wide variety of evidence admissible to guide the jury in making its determination as to the appropriate punishment for the defendant, and the rule that neither side has the burden of proving which of the alternative penalties is the proper one in the case at hand, *People v. Bandhauer*, 66 Cal. 2d 524, 531 (1967) [426 P. 2d 900, 904-905], the California Supreme Court has set forth certain safeguards to protect capital defendants from the use of improper evidence. Initially, the limitations on the admissibility of evidence on the issue of guilt are applicable to the penalty phase of a capital case.

People v. Terry, 61 Cal. 2d 137, 149 (n.8) (1964) [390 P. 2d 381, 389];

People v. Hamilton, 60 Cal. 2d 105, 129-131 (1963) [383 P. 2d 412, 426-428];

People v. Purvis, 56 Cal. 2d 93, 97-99 (1961) [362 P. 2d 713, 715-716].

Among these restrictions are that "the evidence must not be incompetent; it must not be irrelevant; that is, of such a nature that its prejudice to defendant outweighs its probative value; and it must not be directed solely to an attack upon the legality of the prior adjudication." (Footnotes omitted.) *People v. Terry, supra,* 61 Cal. 2d at 144-145 [390 P. 2d at 386]. *Cf. Williams v. New York,* 337 U.S. 241, 246-247. Thus evidence that the victim died in unusual pain has been held inadmissible on the issue of punishment where the evidence did not indicate that that type of pain was intended by the murderer. *People v. Love,* 53 Cal. 2d 843, 856-857 (1960) [350 P. 2d 705, 711-713].

Evidence of other crimes committed by the defendant, *if proved beyond a reasonable doubt* and relevant on the issue of penalty, may also be admissible on the issue of penalty in a capital case, whether or not they are in any way connected with the offense in chief and whether they occurred prior or subsequent to the charged offense. *People v. Tahl,* 65 Cal. 2d 719, 732-733 (1967) [423 P. 2d 246, 254-255]. However, evidence of the mere fact of the defendant's prior arrest is inadmissible where charges were not filed against him, he was released, and the offense itself is not proved. *People v. Hamilton,* 60 Cal. 2d 51, 131-132 (1963) [383 P. 2d 412, 428]. Where the offense itself is sought to be proved, it may not be established solely by extrajudicial admissions of the defendant. *Id.,* 129-131 [383 P. 2d at 426-427].

Similarly, evidence of an attempt by the defendant to escape from death row has been held admissible. *People v. Pike,* 71 Cal. 2d ...., ..., 71 A.C. 617, 622 (1969) [455 P. 2d 776, 778, 781].

Such prior conduct in aggravation of penalty may tend, of course, to show the defendant's lack of remorse, his recidivism and lack of susceptibility to rehabilitation, or the danger which he presents to society.

A defendant may, for example, introduce evidence of his broken home, his lack of education, his good record in military service, and his development of a schizoid personality as a result of his wartime experiences. *People v. Feldkamp,* 51 Cal. 2d 237, 240 (1958) [331 P. 2d 632, 633-634]. *See also People v. Butler,* 65 Cal. 2d 569, 574-575 (1967) [421 P. 2d 703, 707]. Only where the evidence proffered by the defendant is incompetent or totally irrelevant to the matter of penalty is it excluded.

> *See People v. Nye,* 71 Cal. 2d ...., ..., 71 A.C. 376, 392 (1969) [455 P. 2d 395, 404];
>
> *People v. Mitchell,* 63 Cal. 2d 805, 814-815 (1966) [409 P. 2d 211, 217].

A defendant also has the right to introduce evidence which tends to show his innocence of the offense of which he has just been found guilty, on the theory that although the jurors may have been satisfied that his guilt was proved beyond a reasonable doubt, they may in their minds demand a greater degree of certainty to justify imposition of the death penalty. *People v. Terry, supra,* 61 Cal. 2d at 145-147 [390 P. 2d at 387-388]. Likewise the standard jury instruction (No. 8.80, California Jury Instructions—Criminal (3d ed. 1970); *see also* App. p. 222) directs the jury to consider, on the issue of penalty, all the evidence previously received on the issue of guilt.

C. Broad Leeway Is Permitted Counsel in Arguing to the Jury Which Punishment Is Appropriate in Light of the Evidence, So Long as the Jury's Discretion Is Not Expanded to Include Extraneous Matters or Restricted by Foreclosing Consideration of Proper Factors

In order to further "the Legislature's strict neutrality in governing the jury's choice of penalty," the California Supreme Court in *People v. Bandhauer*, 66 Cal. 2d 524 (1967) [426 P. 2d 900], innovated a rule applicable exclusively to penalty proceedings in capital cases, providing for each side to have an opportunity to rebut the other's argument. Thus, instead of the usual practice where the prosecution opens the argument, is answered by the defense, and has an opportunity to respond in closing argument, a fourth argument allowing the defense to close in surrebuttal argument to any prosecution rebuttal argument, and thus have the last word, is permitted in capital cases. *Id.* at 530-531 [426 P. 2d at 904-905].

The scope of the prosecution's argument to the jury at the conclusion of the penalty phase has been carefully circumscribed by the California Supreme Court in order to ensure that the jury's discretion is not expanded to include extraneous matters or restricted by foreclosing the jury from considering proper factors.

Thus argument on factual matters must be confined to the evidence which has been heard by the jury or to matters of common knowledge. *People v. Bandhauer*, 66 Cal. 2d 524, 529-530 (1967) [426 P. 2d 900, 903-904]; *People v. Love*, 56 Cal. 2d 720, 730 (1961) [366 P. 2d 33, 37-40]. It is also forbidden to argue that the defendant's refusal to admit his guilt demonstrates lack of remorse, *People v. Coleman*, 71 Cal.

2d ...., ..., 71 A.C. 1201, 1210-1211 (1969) [459 P. 2d 248, 254], or that if sentenced to life imprisonment the defendant may escape from prison, even where he has previously attempted an escape. *People v. White,* 69 Cal. 2d 751, 761-762 (1968) [446 P. 2d 993, 998].

Arguments that are "calculated to mislead the jury" or that "appeal primarily to passion or prejudice" are not permissible.

> *People v. Love,* 56 Cal. 2d 720, 731 (1960) [366 P. 2d 33, 38].
>
> *See also People v. Purvis,* 56 Cal. 2d 93, 99 (1961) [362 P. 2d 713, 716-717].

In view of the absence of conclusive data on the question, and the fact that the desirability of the death penalty is a legislative matter, it is improper for either side to argue whether or not fear of the death penalty is a deterrent. *People v. Shipp,* 59 Cal. 2d 845, 853 (1963) [382 P. 2d 577, 582]; *People v. Love, supra* at 725-726, 731 [366 P. 2d at 35, 38-39]. Nor may the prosecution's argument direct the attention of the jury to the fact that a defendant under life sentence may be prematurely paroled after serving seven years imprisonment. (Cal. Penal Code § 3046.) *People v. Morse,* 60 Cal. 2d 631, 642-649 (1964) [388 P. 2d 33, 39-44]. It is also impermissible for the prosecution to dilute the jury's sense of responsibility by alluding to the possibility of appeal, to the power of the trial judge and the California Supreme Court to correct the jury's mistakes by reviewing the conviction imposing the death penalty, or to the Governor's power to commute the sentence or grant a pardon to the defendant (*see* Argu-

ment I(E) herein). *People v. Morse, supra* at 649-653 [388 P. 2d at 44-47]; *People v. Linden,* 52 Cal. 2d 1, 26-27 (1959) [338 P. 2d 397, 410]. Nor may reference be made to the possibility that the Legislature might enact retroactive legislation reducing the punishment for the defendant's crime from death to life imprisonment. *People v. Varnum,* 61 Cal. 2d 425, 428-429 (1964) [392 P. 2d 961, 962-963].

The bounds of permissible argument on the matter of penalty have been made readily apparent by their delineation in the California Supreme Court's opinion in *People v. Friend,* 47 Cal. 2d 749 (1957) [306 P. 2d 463]:

> ". . . To aid the jury to act intelligently in making their selection, counsel may properly argue their respective views as to which punishment, under all the circumstances shown, will be more appropriate and desirable in the cause of justice. To that end, appeals to reason in the exercise of the jury's discretion may be proper; so also may be appeals for clemency or for stern retribution. But the jury must not be misled into thinking (or be permitted to persist in an evidenced or known belief) that their discretion in the selection of penalty, as between either of the two alternatives, is in any way circumscribed or limited by law. Their discretion within that area is absolute and they should be so informed." *Id.,* 765 [306 P. 2d at 473].

D. A Particularly Stringent Rule of Prejudicial Error, Making Any "Substantial" Error Per Se Cause for Reversal, Is Applicable in California Exclusively to the Penalty Phase of a Capital Trial

Except where an error is deemed to be of constitutional magnitude, *see Chapman v. California,* 386 U.S. 18, 21-24, it is normally ground for reversal in California appellate courts only where "after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Cal. Const., art. VI, § 13. This test for reversible error has been interpreted by the California Supreme Court to mean: "That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *People v. Watson,* 46 Cal. 2d 818, 836 (1956) [299 P. 2d 243, 254].

However, instead of the foregoing standard a particularly stringent rule of prejudicial error has been formulated by the California Supreme Court for error occurring during the penalty phase of a capital case, in view of the fact that there the issue is life or death and the jury is given wide discretion on this matter:

> ". . . Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is

overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence, the misconduct and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in the absence of error. If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another. The facts that the evidence of guilt is overwhelming, as here, or that the crime involved was, as here, particularly revolting, are not controlling. This being so it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial. . . ."

People v. Hamilton, 60 Cal. 2d 105, 136-137 (1963) [383 P. 2d 412, 431].

See also People v. Hines, 61 Cal. 2d 164, 168-170 (1964) [390 P. 2d 398, 401-402].

E. Multifaceted Review of Every Jury Verdict Imposing the Death Penalty Is Afforded by the Trial Judge, the California Supreme Court, and the Governor Each Having—and Often Exercising—Discretion to Supplant the Jury's Decision

In evaluating the constitutional adequacy of the procedures applicable in California capital cases, and specifically the adequacy of the standards given the jury to guide the exercise of its discretion, a crucial question is whether the jury's decision that the defendant shall suffer the death penalty is reviewable or instead absolutely final.

In California the capital defendant has several occasions to have his penalty reviewed.

(1) *The Trial Judge's Power to Reduce the Jury's Death Penalty Verdict to Life Imprisonment*

After the jury has returned a verdict imposing the death penalty, and before final judgment is entered, the defendant may move for a new trial, reduction of the penalty, or both. The trial court may grant a new trial or instead, without granting a new trial, reduce the penalty to life imprisonment or reduce the degree of the offense so as to preclude the possibility of a death sentence. Cal. Penal Code § 1181(6)(7).

In determining whether to reduce the punishment from death to life imprisonment, the trial judge is "free to exercise [his] discretion" based on his "own independent view of the evidence." He need not find any error in the proceedings to justify a reduction of penalty. *People v. Moore*, 53 Cal. 2d 451, 454 (1960) [348 P. 2d 584, 586.]

A trial court may not rely on the jury's verdict alone "and thus shift its own responsibility to the jury. It ha[s] an independent responsibility to give defendant

and the People the benefit of its own judgment as to whether or not the death penalty was proper." *People v. Love,* 56 Cal. 2d 720, 728-729 (1961) [366 P.2d 33, 37]. Failure of the trial judge to consider properly a motion for reduction of penalty is ground for vacating the judgment and remanding the case to the trial court for reconsideration of the motion. *Id.,* 729 [366 P. 2d at 37.]

Contrary to what is stated in the *amicus curiae* brief filed by the N.A.A.C.P. Legal Defense Fund *et al.,* it is *not* "unworldly to suppose that California trial judges do or will set aside a jury's death verdict except in the rarest cases." *Id.,* 71. In contrast to what may be the practice under the Federal Kidnapping Act, *see United States v. Jackson,* 390 U.S. 570, 573-574 (n. 7), the trial judge's power to set aside a death verdict in California is exercised significantly.

No figures as to the number of instances in which the power has been invoked are available either in published form or in the files of the agencies concerned. However, as illustration of the use by trial judges of the aforementioned power, respondent directs the attention of this Court to the fact that, in Los Angeles County, judges reduced jury death verdicts to life imprisonment in two separate cases during a single week earlier this year. *People v. Isaac Jernigan,* Los Angeles Superior Court No. A-581816 (May 20, 1970); *People v. Vassie Washington, Jr.,* Los Angeles Superior Court No. A-000400 (May 18, 1970).

The comments of the trial judges in the two cases cast some light on the broad nature of this power and on the willingness of trial judges to invoke it.

In the *Jernigan* case the trial judge concluded that although the defendant was legally sane, the jury did not give proper weight to the evidence of the five psychiatrists who examined him and testified as to his mental condition. The psychiatrists had testified that Jernigan, who shot to death his plant supervisor and the president of his union, was mentally ill at the time of the slaying. *Id.*,[10] The Los Angeles Times, part 11, p. 1 (May 21, 1970).

In the *Washington* case, the California Supreme Court had previously reversed the judgment insofar as it related to penalty, on the ground that one of the prospective jurors was excused for cause in violation of the rule set forth in this Court's opinion in *Wither-*

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[10]The record of the proceedings, *id.*, is as follows:

"THE COURT: The jury found the defendant guilty of murder in the first degree as to two counts and murder of the second degree as to one count and also found the defendant legally sane at the time of the commission of the offenses. These verdicts are fully supported by the evidence and I personally agree with them.

"In the determination of the penalty to be imposed under Counts I and II, the Court is of the opinion that the jury did not give proper weight to the evidence of the five medical doctors, specialists in psychiatry, who examined the defendant and testified as to his mental condition.

"In this connection, it is noted that human beings vary widely by imperceptible degrees as to their mental health and it is only persons whose mental illness reaches certain levels which the law has set, perhaps somewhat arbitrarily, who are excused from punishment for their acts.

"Nevertheless, the defendant's mental health at the time of the commission of the acts is, it seems to me, an important matter to be taken into consideration as to the nature of the penalty. Further matters of importance are the heinous nature of the crime and the effect thereof on the families of the victims. In this connection, notwithstanding the great amount of sympathy and compassion I feel for the families of Mr. Domonoske, Mr. McNett and Mr. Nolan, it must be realized that no punish-

(This footnote is continued on the next page)

spoon v. Illinois, 391 U.S. 510. *People v. Washington*, 71 Cal. 2d ....., ..., 71 A.C. 1105, 1134 (1969) [458 P.2d 479, 496-497]. Upon retrial of the penalty issue, the defendant was again given the death penalty by a jury. The evidence before the jury indicated that after a quarrel with his common-law wife, the defendant had poured gasoline on two beds where four of her children were sleeping and that he then set the gasoline on fire, burning to death one of the children. The trial judge reduced the death verdict to life imprisonment after stating that he had "reviewed and weighed the evidence during the trial independently of the conclusion the jury reached" and had "considered not only the evidence but the aims of the criminal

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ment inflicted upon Mr. Jernigan will restore these men to their families.

"Four of the psychiatrists gave their medical opinion that the defendant was mentally ill at the time of the murders, three stating that he suffered from schizophrenia, paranoid-type, and one stating that he suffered a mental illness which was characterized by paranoid ideas. The fifth psychiatrist testified that the defendant had a paranoid-type of personality.

"A recognized psychological test was suggestive of a major emotional disorder on the nature of paranoid schizophrenia. In view of this evidence, it seems to the Court that it ill becomes the State to muster its gigantic power to put this sick man to death and that the interests of justice are served by the State forebearing to exercise this power in this instance and to imprison this defendant for life.

"I am not one who believes that the Adult Authority will abdicate its responsibility and free Isaac Jernigan after a short period of time. In this connection I am reminded of the case of Verlin Spencer, who committed somewhat similar murders, and who is still incarcerated after 30 years.

"Accordingly, the motion for new trial is denied, but pursuant to Subdivision 7 of Section 1181 of the Penal Code, the verdicts as to Counts I and II are modified to provide punishment by life imprisonment as to each such count in lieu of death."

law." The trial judge concluded that there had been "a continuous buildup of some kind of passion" and that, because of the unique set of circumstances, sentencing the defendant to death would not serve as a deterrent to others.

People v. Vassie Washington, Jr., supra, Los Angeles Superior Court No. A-000400;

The Los Angeles Times, part II, p. 1 (May 19, 1970).

(2) *The California Supreme Court's Power of Appellate and Post-Appellate Review*

Capital cases are reviewed directly by the California Supreme Court; non-capital cases are reviewed by the Courts of Appeal, intermediate appellate courts for the five appellate districts of the State, and generally by the California Supreme Court only when that court in the exercise of its discretion grants a petition for hearing after decision by the Court of Appeal.

Cal. Const., art. VI, § 11;

Cal. Rules of Court, Rules 28, 29.

California's Penal Code section 1239(b) provides, "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel." The automatic appeal stays execution of the death sentence. Cal. Penal Code § 1243. The California Supreme Court has interpreted section 1239(b) as requiring it to re-

view the record for errors not raised by the defendant where the case is a capital case.

See People v. Goodridge, 70 Cal. 2d 824, 839 (1969) [452 P. 2d 637, 646-647];

People v. Robinson, 61 Cal. 2d 373, 388 (n. 14) (1964) [392 P. 2d 970, 979].

The court has carried to great lengths its duty to give particularly conscientious review to all capital cases. Even where a capital defendant, expressing his desire to die in the gas chamber, wishes to dismiss his appointed counsel, proceed *in propria persona,* and dismiss his automatic appeal, the California Supreme Court has felt itself bound to examine the entire record to ascertain whether the defendant received a fair trial, and to prepare a formal opinion for publication in the official reports. *See People v. Stanworth,* 71 Cal. 2d ....., ..., 71 A.C. 858, 867-873 (1969) [457 P. 2d 889, 895-900]. In the *Stanworth* case the court, contrary to the defendant's wishes, reversed the judgment insofar as it imposed the death penalty because the jury had been erroneously instructed that it could not be influenced by pity or sympathy for the defendant. *Id.,* 880-881 [457 P. 2d at 900-901].

The California Supreme Court has often stated that in the absence of substantial error requiring reversal of the verdict reached at the penalty phase of a capital case, it will not "substitute its judgment as to choice of penalty for that of the trier of fact." *People v. Anderson,* 69 Cal. 2d 613, 623 (1968) [447 P.2d 117,

124]. Nevertheless, the exacting review given all capital cases by the California Supreme Court provides capital defendants with an important safeguard against the possibility of an arbitrary decision by the jury, as indicated by the particularly stringent rules fashioned by that court for the trial of capital cases, and detailed in the preceding arguments herein.[11]

Under the doctrine of diminished capacity, the court has frequently concluded that a capital defendant lacked capacity to reflect maturely upon the consequences of his acts, the court deeming inadequate the evidence of the defendant's ability to premeditate in light of the psychiatric evidence presented at the trial. In such instances the court has reduced the degree of the offense from first degree murder to second degree murder, which offense carries a punishment of five years to life, without remanding the case for a new trial.

See, e.g., People v. Bassett, 69 Cal. 2d 122, 148 (1968) [443 P.2d 777, 794];

People v. Nicolaus, 65 Cal. 2d 866, 883 (1967) [423 P.2d 787, 799];

People v. Goedecke, 65 Cal. 2d 850, 861 (1967) [423 P.2d 777, 784-785];

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[11]When a defendant who is tried for a capital offense receives life imprisonment and successfully appeals his conviction, under no circumstances may he be given the death penalty upon his retrial. *People v. Henderson,* 60 Cal. 2d 482, 495-497 (1963) [386 P. 2d 677, 685-686]. *Cf. Moon v. Maryland,* 398 U.S. 319, 320; *North Carolina v. Pearce,* 395 U.S. 711, 719-723.

People v. Ford, 65 Cal. 2d 41, 59 (1966) [416 P.2d 132, 143].

The court has acted similarly where its review of the evidence left it unconvinced beyond a substantial doubt as to the sufficiency of the evidence of actual premeditation or specific intent to commit one of the felonies which, under the felony-murder rule, rendered the offense murder in the first degree, punishable by death.

See People v. Anderson, 70 Cal. 2d 15, 36 (1968) [447 P.2d 942, 955].

See also People v. Hall, 62 Cal. 2d 104, 108-112 (1964) [396 P.2d 700, 703-705] (reversing a second-degree murder conviction on the ground that the evidence identifying the defendant as the perpetrator of the crime was insufficient).

It is abundantly evident from the California Supreme Court's collective disposition of capital cases during the last several years that the court accords each capital defendant a meaningful review of the proceedings by which the jury or trial judge imposed the death penalty. Respondent's examination of the official case reports discloses the following figures for the preceding five-year period, from September 1, 1965, to September 1, 1970:

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TABLE A

DEFENDANTS UNDER SENTENCE OF DEATH REVIEWED BY THE CALIFORNIA SUPREME COURT, 1965-1970*

PERIOD	DIRECT APPEALS			COLLATERAL ATTACKS WHERE ORDER TO SHOW CAUSE ISSUED	
	Total	Affirmed in Entirety	Death Penalty, Conviction, or Both Set Aside	Writ Denied	Writ Granted—Death Penalty, Conviction, or Both Set Aside
Sept 1 1965 - Sept 1 1967	50	25 (50%)	25 (50%)	0	4
Sept 1 1967 - Sept 1 1970	59	18 (31%)	41 (69%)	0	15
Total Sept 1 1965 - Sept 1 1970	109	43 (39%)	66 (61%)	0	19

*Some defendants appear in this table more than once in that their judgment imposing the death penalty was considered in successive proceedings by the court. Defendant Gilbert in *People v. Gilbert*, 63 Cal. 2d 690, appears in one instance in both an affirmance and a reversal due to the fact that in a single proceeding one count imposing the death penalty was reversed and another such count affirmed. The cases comprising this table are collected in the Appendix to Respondent's Brief, *infra*, with references to which theory, or which felony under the felony-murder rule, formed the basis for fixing the murder in the first degree. Other distinguishing features of the offense particularly pertinent to the determination of penalty are also indicated. In approximately 5% of the cases jury trial was waived and the issue of penalty tried to the court.

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The following specific cases illustrate the close scrutiny which the California Supreme Court gives to capital cases (and the difficulty which prosecutors have at the present time in obtaining a final judgment imposing the death penalty).

One defendant, whose capital offenses were committed over ten years ago, has on *six* occasions received full review of his case by the California Supreme Court, involving in each instance the preparation of a published opinion. On the last occasion the judgment was reversed insofar as it imposed the death penalty, on the ground that the jury selection process did not conform to this Court's mandate in *Witherspoon v. Illinois*, 391 U.S. 510.[12] The defendant's penalty retrial is currently stayed pending the outcome of the case at bar. Another capital defendant has had his case reviewed extensively on four occasions by the California Supreme Court and is currently before this Court on petition for writ of certiorari.[13]

The California Supreme Court ordered a fifth penalty trial for one capital defendant, who murdered a police officer more than ten years ago, only to stay such pro-

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[12]*See People v. Seiterle*, 56 Cal. 2d 320 (1961) [363 P. 2d 913]; *Seiterle v. Superior Court*, 57 Cal. 2d 397 (1962) [369 P. 2d 697]; *People v. Seiterle*, 59 Cal. 2d 703 (1963) [381 P. 2d 947], *cert. denied*, 375 U.S. 887; *In re Seiterle*, 61 Cal. 2d 651 (1964) [394 P. 2d 556], *cert. denied*, 379 U.S. 992; *People v. Seiterle*, 65 Cal. 2d 333 (1966) [420 P. 2d 217], *cert. denied*, 387 U.S. 912; *In re Seiterle*, 71 Cal. 2d ...., 71 A.C. 722 (1969) [456 P. 2d 129].

[13]*See People v. Varnum*, 61 Cal. 2d 425 (1964) [392 P. 2d 961]; *In re Varnum*, 63 Cal. 2d 629 (1965) [408 P. 2d 97]; *People v. Varnum*, 66 Cal. 2d 808 (1967) [427 P. 2d 772], *cert. denied*, 390 U.S. 529; *People v. Varnum*, 70 Cal. 2d 480 (1969) [450 P. 2d 553], *petition for cert. filed* (Oct. Term. 1970, No. 5047).

ceedings a few months later in issuing an order to show cause, which is still pending before that court, why the judgment should not be reversed in its entirety.[14]

Finally, there is the case of the defendant whose judgment imposing the death penalty was reversed on a rule of law that was totally novel to California courts, to wit, that it would henceforth be deemed improper for a prosecutor or a trial judge to inform the jury of the fact that a defendant under life sentence is eligible for parole after serving seven years imprisonment. (Cal. Penal Code § 3046). On retrial of the penalty issue, the jury imposed a life sentence on the murder charges. While in his cell awaiting formal sentencing, the defendant garrotted a fellow prisoner with a mattress cover. The defendant killed the other prisoner, who was on the other side of the bars, because he owed the defendant some cigarettes. For this offense the defendant was tried by jury and sentenced to death. Last year the California Supreme Court, in two separate opinions filed the same day, reversed both cases.[15]

In addition to the automatic appeal in all capital cases, and the right to petition the California Supreme Court for rehearing in such cases, various writs and other means of collateral extraordinary relief are available in the California Supreme Court and other Cali-

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[14]*See People v. Terry*, 57 Cal. 2d 538 (1962) [370 P. 2d 985], *cert. denied*, 375 U.S. 960; *People v. Terry*, 61 Cal. 2d 137 (1964) [390 P. 2d 381]; *People v. Terry*, 70 Cal. 2d 410 (1969) [454 P. 2d 36], *cert. denied*, 379 U.S. 866; *In re Terry*, 1 Cal. 3d, Minutes, p. 1 (November 12, 1969).

[15]*People v. Morse*, 60 Cal. 2d 631 (1964) [388 P. 2d 33]; *In re Morse*, 70 Cal. 2d 702 (1969) [452 P. 2d 601]; *People v. Morse*, 70 Cal. 2d 711 (1969) [452 P. 2d 607], *cert. denied*, 397 U.S. 944.

fornia courts: habeas corpus, mandamus, certiorari, prohibition, coram nobis, and petition to recall the remittitur.

Cal. Const., art. VI, § 10;

Cal. Penal Code §§ 1265, 1473-1508;

Cal. Rules of Court, Rule 25(d).

See also Witkin, California Criminal Procedure 744-795, and 1969 Supplement 364-385;

People v. Sanchez, 70 Cal. 2d 562 (1969) [451 P.2d 74] (vacating previous opinion affirming death penalty, on petition to recall remittitur).

Under California law a defendant in a capital case has a particularly absolute right to a trial free from community pressure, enforceable in advance of trial by writ of mandate of an appellate court to compel change of venue, or by reversal of the judgment where change of venue has been erroneously denied by the trial court.

People v. Tidwell, 3 Cal. 3d 62, 75-76 (1970) [.... P.2d ...., ...] (Crim. 12057, August 28, 1970);

Maine v. Superior Court, 68 Cal. 2d 375 (1968) [438 P. 2d 372].

In furtherance of the right of capital defendants to post-appellate review, the California Supreme Court has made the following special provision for appointment of counsel:

". . . We believe that it will protect the interests of defendants and promote the cause of justice

for this court to appoint counsel to represent indigent defendants in capital cases in the following proceedings undertaken between the termination of their state appeals and their execution: (a) Proceedings in this court for post-conviction review; (b) Proceedings for appellate or other post-conviction review of state court judgments in the United States Supreme Court, subject however to the power of that court to appoint counsel therein; (c) Applications for executive clemency, and the conduct of sanity hearings where indicated. Hereafter, as a matter of policy, and upon application of the defendant, we will appoint counsel in such instances. Any request for the appointment of counsel in any other proceeding should be addressed to the court in which the proceeding is brought." (Footnote omitted.)

In re Anderson, 69 Cal. 2d 613, 633-634 (1968) [447 P. 2d 117, 131].

See also Cal. Penal Code § 1239(b) (as amended 1968).

The lower federal courts have similarly provided for the appointment of counsel to represent indigent California capital defendants in collateral proceedings before those courts.

In addition to the foregoing remedies available to capital defendants, there is also provision for the warden of the state prison to whom the capital defendant is entrusted to inform the district attorney of the county of any doubt as to the defendant's sanity. The district attorney must thereupon file in the superior court a

petition for a sanity hearing. Cal. Penal Code §§ 3700-3706. *See In re Kemp,* 1 Cal. 3d 190, 192(n.1) (1969) [460 P.2d 481, 482]. A defendant under sentence of death also has the right to have himself examined by a psychiatrist of his own attorney's choice. *In re Ketchel,* 68 Cal. 2d 397 (1968) [438 P.2d 625].

(3) *The Governor's Frequently Exercised Power to Grant a Pardon or Commutation, and His Automatic Review of All Capital Cases*

California Penal Code section 1218 provides:

> "The judge of the court at which a judgment of death is had, must, immediately after the judgment, transmit to the Governor, by mail or otherwise, a statement of the conviction and judgment, and a complete transcript of all the testimony given at the trial including any arguments made by respective counsel and a copy of the clerk's transcript."

The Governor has broad powers to investigate, grant a pardon or reprieve, or commute the sentence of a prisoner in a capital case.

Cal. Const., art. V, § 8;

Cal. Penal Code §§ 4800-4906.

That this power is an additional meaningful safeguard on the procedures by which the death penalty is imposed in California is evident from the frequency with which this power is exercised. The use of such power by the current Governor and his predecessor is indicated by the following figures obtained from the files of Associate Warden James W. L. Park of the California State Prison at San Quentin:

TABLE B

COMMUTATIONS OF DEATH SENTENCES IN CALIFORNIA, 1959-1970

Capital Cases	Executions	Commutations
Governor Edmund G. Brown 1959-1966	35	23
Governor Ronald Reagan 1967-1970	1	1

The reason for the lower figures in recent years is that the California Supreme Court, as well as other California and lower federal courts, as a matter of course issued stays of execution to capital defendants during the pendency of the proceedings in *In re Anderson,* 69 Cal. 2d 613 (1968) [447 P.2d 117], in which the constitutionality of the procedures by which the death penalty is imposed was at issue, and similarly this Court and the lower federal courts have issued such stays during the pendency of *Maxwell v. Bishop,* 398 U.S. 262, and the case at bar. *See People v. Goodridge,* 70 Cal. 2d 824, 839 (1969) [452 P.2d 637, 646]. The issuance of these stays is also in part responsible, with the multitude of reversals in capital cases, for the increase to 90 in the number of persons under sentence of death in California as of September 1, 1970. California State Prison at San Quentin, Monthly Execution Data (September 1, 1970).[16] Concurrently the median time spent by prisoners awaiting execution in the United States has increased from 14.4 months in 1961 to 39.2 months in 1969. U.S. Bureau of Prisons, National Prisoner Statistics—Capital Punishment 1930-1969 (Table 4) (1970) (Preliminary Draft, not yet published).

[16]Of these 90 persons 41 were committed from Los Angeles County. One of the 90 is a woman. *Id.*

F. The Flexible Guidelines Given the Jury at the Penalty Phase of a California Capital Case Are Constitutionally Preferable to the Fixed Standards Elsewhere Proposed

The preceding arguments have detailed the workings of the bifurcated trial system in California capital cases —the applicable statutes, the standard jury instructions, the special rules governing the admissibility of evidence and the scope of argument, the unique standard of prejudicial error, and the myriad opportunities for judicial and executive review of the jury's decision.

In evaluating the procedures here in question, great weight must be attached to the scheme of judicial decisions, executive powers, and related practices that have evolved around the conduct and review of capital penalty proceedings in California. This Court has stressed that it "ordinarily accepts the construction given a state statute in the local courts and also presumes that the statute will be construed in such a way as to avoid the constitutional question presented, Fox v. Washington, 236 U.S. 273; Poulos v. New Hampshire, 345 U.S. 395."

Baggett v. Bullitt, 377 U.S. 360, 375.

See also Coleman v. Alabama, 399 U.S. 1, 9.

It is in the context of this functioning, viable system that the question must be asked and answered: was the standard instruction, which was given the jury to guide it in evaluating the factors it might consider in fixing petitioner's punishment, vague and conducive to an arbitrary verdict so as to violate petitioner's constitutional right to due process of law?

Any such inquiry begins with the presumption that California Penal Code section 190.1, the statute from whose words the standard instruction is borrowed, is constitutionally valid, notwithstanding the possibility that application of the statute may conceivably result in there being *some* leeway insofar as similarly situated persons are affected. *McGowan v. Maryland,* 366 U.S. 420, 425-428; *Salsburg v. Maryland,* 346 U.S. 545, 553-554. This presumption is strengthened by the circumstance that the procedure under attack lies at the heart of the States' police power, involving as it does the right of the people as expressed directly or through their legislature to prescribe the manner of trial and punishment for those who commit what are deemed the most heinous of crimes. Under our federal system this factor is entitled to great weight. *Salsburg v. Maryland, supra* at 550.

A state rule of procedure "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Snyder v. Massachusetts,* 291 U.S. 97, 105.

> "Tolerance for a spectrum of state procedures dealing with a common problem of law enforcement is especially appropriate here. . . ."
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> ". . . With [violent crime] the major problem that it is, substantial changes in trial procedure in countless local courts around the country would be required were this Court to sustain the contentions made. . . . To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustifiable encroachment by this Court upon the

> constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision in the United States Constitution. . . ."
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> *Spencer v. Texas,* 385 U.S. 554, 566, 568-569.
>
> *See also Williams v. New York,* 337 U.S. 241, 251.

In this context it bears mention that in evaluating constitutional claims, this Court has not blinded itself to practical considerations, such as the effect of its rulings on the administration of justice. *See Johnson v. New Jersey,* 384 U.S. 719, 728; *Elkins v. United States,* 364 U.S. 206, 222. While never conclusive where the constitutional rights of an accused are at stake, such considerations weigh heavily in the exercise of this Court's constitutionally mandated duty to balance competing interests, *see Camara v. Municipal Court,* 387 U.S. 523, 534-537, in determining whether to invalidate as unconstitutional a legislative enactment or judicial rule of state practice. *Leland v. Oregon,* 343 U.S. 790, 798.

Thus it is significant that the laws of 39 of those 41 States, as well as of the United States and the District of Columbia, which prescribe the death penalty as a proper punishment, would be overturned by the blanket rejection, sought by amici curiae N.A.A.C.P., *et al.,* of all penalty determination under flexible standards.[17]

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[17] *See* Special Issue, *A Study of the California Penalty Jury in First-Degree-Murder Cases,* 21 Stan. L. Rev. 1297, 1432-1438 (1969) (compilation of jurisdictions having the death

The mandating of discretionless deliberations on the issue of who is fit to live would perhaps ensure immunity from capital punishment to those criminals who even inside the prison walls present the greatest danger to their fellow man,[18] in view of the possibility that application of any procedures enacted subsequent to an adverse decision by this Court on the issue in question would be held unconstitutional as *ex post facto*. *See also United States v. Jackson,* 390 U.S. 570, 580.

Another foundational underpinning of the procedure, by which the jurisdictions in this country having the death penalty submit the matter of capital punishment to the discretion of the jury, is the doctrine of *stare decisis* under which weight must be given the decisions of this Court[19] sanctioning the procedure in question. *Andres v. United States,* 333 U.S. 740, 742-744;

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penalty with citations as to what standards, if any, exist to guide the jury—although respondent does not necessarily accept the authors' characterization of the various statutes, particularly of California's as having no standards; however, this difference of view may be merely a semantic discrepancy). There are two States in which the death penalty, where provided by law, is mandatory. *Id.,* 1437.

[18]In a recent seven-year period, a total of 68 California prisoners died as the result of criminal homicide by a fellow inmate. California Bureau of Criminal Statistics, Death in Custody—California 1962-1968, 9 (Table III) (1969). Unpublished information available in the files of the California Department of Corrections indicates a dramatic upsurge in prison homicides. Respondent is advised that during the period September 1, 1969, to September 1, 1970, there were 16 adult felons killed by fellow inmates in California, and two staff members of the Department killed by inmates.

[19]*See also, e.g., In re Ernst's Petition,* 294 F. 2d 556, 560-561 (3d Cir. 1961), *cert. denied,* 368 U.S. 917; *Ochoa v. United States,* 167 F. 2d 341, 345 (9th Cir. 1948); *Ex Parte Sullivan,* 83 F. 2d 796, 798 (9th Cir. 1936); *In re Anderson,*

Winston v. United States, 172 U.S. 303, 312-313.

". . . [U]nguided discretion in the choice between penalties which may be imposed under a first degree [murder] verdict has long been characteristic of the laws of the United States and of many states. . . ."

In re Ernst's Petition, supra, 294 F. 2d at 560.

See also 18 U.S.C.A. § 1111;

Mathes and Devitt, Federal Jury Practice and Instructions 310-311;

Special Issue, *A Study of the California Penalty Jury in First-Degree-Murder Cases,* 21 Stan. L. Rev. 1297, 1432-1438 (1969) (see n. 17, *infra*).[20]

While not desiring to enter the metaphysical debate which brews over the meaning of this Court's eighth footnote in *Giaccio v. Pennsylvania,* 382 U.S. 399,

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69 Cal. 2d 613, 621-628 (1968) [447 P. 2d 117, 123-128]; *State v. Walters,* 145 Conn. 60 (1968) [138 A. 2d 786, 792-794], *appeal dismissed* and *cert. denied,* 358 U.S. 46; *People v. Bernette,* 30 Ill. 2d 359 (1964) [197 N.E. 2d 436, 443]; *State v. Latham,* 190 Kan. 411 (1962) [375 P. 2d 788, 796-799], *cert. denied,* 373 U.S. 919; *Chatterton v. Dutton,* 223 Ga. 243 (1967) [154 S.E. 2d 213, 214-215], *cert. denied,* 389 U.S. 914; *State v. Forcella,* 52 N.J. 263 (1968) [245 A. 2d 181, 193-194]; *Johnson v. Commonwealth,* 208 Va. 481 (1968) [158 S.E. 2d 725, 729-730]; *State v. White,* 60 Wash. 2d 551 (1962) [374 P. 2d 942, 954-955], *cert. denied,* 375 U.S. 883.

[20] "[I]n England the death penalty, wherever applicable by statute, was mandatory on the trial process." H. Kalven & H. Zeisel, The American Jury 434 (1966). For other nations, *see* United Nations, Capital Punishment 11-13 (N.Y. 1962).

403,[21] respondent wishes to stress that the procedure at issue in the case at bar has little in common with the practice invalidated in *Giaccio*. Entrusting to the jury's discretion the decision whether a capital defendant is fit to live involves considerations quite distinguishable from the problems caused by a statute "so vague and standardless that it . . . leaves judges and jurors free to decide, without any legally fixed standards, what is *prohibited* and what is not in each particular case."[22] (Emphasis added.) *Id.*, 402-403.

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[21]"In so holding [that a statute permitting a jury, without any standards, to assess costs against an acquitted defendant violates the due process clause] we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." *Id.*, 405. *See* Petitioner's Brief, p. 20; Brief Amicus Curiae filed by the N.A.A.C.P. Legal Defense Fund, *et al.*, p. 60.

[22]*Cf. People v. Daniels*, 71 Cal. 2d ...., ..., 71 A.C. 1165, 1175 (1969) [459 P. 2d 225, 230-231]:

". . . It is true that an effort to define the phrase, 'another part of the same county,' in terms of a specific number of inches or feet or miles would be open to a charge of arbitrariness. But it does not follow, conversely, that a definition other than in such terms would necessarily be 'uncertain' in any legally objectionable sense of the word. The law is replete with instances in which a person must, at his peril, govern his conduct [and the jury must gauge it] by such non-mathematical standards as 'reasonable,' 'prudent,' 'necessary and proper,' 'substantial,' and the like. Indeed, a wide spectrum of human activities is regulated by such terms: thus one man may be given a speeding ticket if he overestimates the 'reasonable or prudent' speed to drive his car in the circumstances [citation], while another may be incarcerated in state prison on a conviction of wilful homicide if he misjudges the 'reasonable' amount of force he may use in repelling an assault [citations]. As the Supreme Court said in Go-Bart Importing Co. v. United States (1931) 282 U.S. 344 . . ., 'There is no formula for the determination of reasonableness.' *Yet standards of this kind are not impermissively vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind.*" (Emphasis added.) *See also Nash v. United States*, 229 U.S. 373, 377.

Nor do the flexible guidelines which govern proceedings on the matter of penalty in California capital cases saddle the murder defendant with "general abstract charges" against which "[i]t would be difficult if not impossible for a person to prepare a defense." *Id.*, 404. *See Maxwell v. Bishop*, 398 F. 2d 138, 149-150 (8th Cir. 1968), *rev'd on another ground*, 398 U.S. 262.

Clearly, at the time he committeed his crime any legally sane murderer was on "notice" as to the unlawfulness of those acts comprising the offense of murder, *see Ginsberg v. New York*, 390 U.S. 629, 643, and he and his counsel have full and unrestricted opportunity to prepare a defense at the initial stage of the proceedings involving the sole issue of guilt. *Cf. Garner v. Louisiana*, 368 U.S. 157, 173. In the event the defendant is found guilty, he has the opportunity to present at the penalty phase of the proceedings all favorable or mitigating evidence concerning the offense and relating to his entire life background. What task could be easier for any attorney or his client? Virtually anything and everything helpful to the defendant, and relevant to the type of man he is, is admissible. Even the most vicious criminal is able to select some incident in his present or in his early years to evoke a measure of sympathy from the jury. *See, e.g., People v. Goodridge*, 70 Cal. 2d 824, 832-833 (1969) [452 P. 2d 637, 642] (necrophilic sodomite's unhappy childhood).

And where the defendant has pleaded insanity as a separate defense, he receives a *tri*furcated trial in

California, the issue of sanity being tried by the jury after the guilt issue and before the penalty issue. Cal. Penal Code §§ 190.1, 1026. In that event he is examined at government expense by at least two court-appointed psychiatrists.

Cal. Penal Code § 1027.

See also Cal. Penal Code §§ 1368-1370.

The argument is made that, regardless of the rules defining the scope of the jury's proper exercise of discretion and the type of evidence and argument permissible at the penalty phase of a capital case in California, the jury is free to fix the penalty at death on an arbitrary, impermissible basis such as race, social-economic status, the color of the defendant's hair, etc.

To the extent humanly possible, California precludes such arbitrariness by its standard jury instructions, which tell the jury to "consider all of the evidence received here in court . . . throughout the trial" and that "the authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you." California Jury Instructions—Criminal (3d ed. 1970), Nos. 1.30, 8.80. (*See* App. pp. 221, 222.)

To state the obvious, there is no instruction or procedure conceivable in the criminal process that would preclude the possibility of a juror's (or for that matter, a judge's) fixing the penalty at death for reasons of bias or whim. "[I]n considering whether a rigid con-

stitutional barrier should be created, it must be remembered that there is possibility of abuse wherever a judge must choose between life imprisonment and death."[23] *Williams v. New York*, 337 U.S. 241, 251.[24] But the standard California jury instructions confine the chance of a verdict being arbitrarily fixed to a humanly and constitutionally acceptable range. If anything, the procedures applicable to capital cases in California have put the advantage on the defendant's side of the "line of neutrality." *Witherspoon v. Illinois*, 391 U.S. 510, 520. *See id.*, 532, 536 (dissenting opinion of Black, J., concurred in by Harlan, J., and White, J.).

There is a vital distinction between what the jury may conceivably do on its own and what it may do at the direction of the trial judge, the prosecution, or any other facet of the trial court setting. As this Court stated in the context of those inferences which may be drawn from the failure of an accused to testify in his own behalf,

> ". . . It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. People v. Modesto, 62 Cal.2d 436, 452-453, 398 P. 2d 753,

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[23]*See also Beauharnais v. Illinois*, 343 U.S. 250, 263; *Harris v. United States*, 331 U.S. 145, 155: "[W]e should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable."

[24]In the *Williams* case this Court found the trial judge's discretion constitutionally unobjectionable even though he was free to consider inadmissible hearsay evidence on the issue of penalty. *Id.*, 244-250. *Cf. People v. Terry*, 61 Cal. 2d 137, 144-145 (1964) [390 P. 2d 381, 386].

762-763. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another. . . ."

Griffin v. California, 380 U.S. 609, 614.

What more can be done than giving the jury instructions which tell them to base their verdict on specified permissible criteria and not to exercise their discretion arbitrarily? All that can ever be hoped for is that jurors passing on the ultimate question whether the defendant is "fit to live," *Witherspoon v. Illinois, supra* at 521 (n. 20); *People v. Morse,* 60 Cal. 2d 631, 647 (1964) [388 P. 2d 33, 43], will obey these instructions and having been selected by constitutionally permissible means will exercise their function as the "conscience of the community,"[25] *Witherspoon v. Illinois, supra* at 519, thereby according both the defense and the prosecution a fair and impartial trial.

As this Court stated with reference to a venireman's attitude, in advance of trial, on the issue of penalty in a capital case,

> ". . . the most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, . . . regardless of the facts and circum-

[25] "In our criminal courts the jury sits as the representative of the community; its voice is that of the society against which the crime was committed." *Williams v. New York,* 337 U.S. 241, 253 (dissenting opinion of Murphy, J.).

stances that might emerge in the course of the proceedings." (Emphasis by the Court.)

Witherspoon v. Illinois, supra, 391 U.S. at 522 (n. 21).

". . . [O]ne of the most important functions any jury can perform in making such a selection [between life imprisonment and the death penalty] is to *maintain a link between contemporary community values and the penal system*—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society." (Emphasis added.)

Witherspoon v. Illinois, supra, 391 U.S. at 519 (n. 15), quoting from *Trop v. Dulles,* 356 U.S. 86, 101 (opinion of Warren, C.J., joined by Black, J., Douglas, J., and Whittaker, J.).

The issue at hand then is not whether *fixed* standards for jury determination of penalty in capital cases are legislatively, philosophically, or sociologically advisable, but rather whether they are *constitutionally* compelled to assist the jury in performing its function as "a link between contemporary community values and the penal system." *Witherspoon v. Illinois, supra,* 391 U.S. at 519 (n. 15).

Respondent submits that petitioner and amici curiae N.A.A.C.P. *et al.* have failed to demonstrate that fixed standards are preferable on the basis of *any* criteria, let alone that "the absence of expressly stated standards in the statute requires that it be forthwith condemned constitutionally." *Maxwell v. Bishop,* 398 F. 2d 138, 149 (8th Cir. 1968), *rev'd on another ground,* 398 U.S. 262.

It has been judicially observed that it may be "neither practicable nor desirable that any stated criteria should control a jury" in deciding between life imprisonment and the death penalty.

In re Ernst's Petition, supra, 294 F. 2d 556, 560 (3d Cir. 1961).

See also Winston v. United States, supra, 172 U.S. 303, 312;

In re Anderson, supra, 69 Cal. 2d 613, 625 (1968) [447 P. 2d 117, 125] ("But even if it were practicable and desirable to have such a formula it does not follow that the Legislature's failure to provide one renders the sections unconstitutional");

State v. Johnson, 34 N.J. 212 (1961) [168 A. 2d 1, 10-11], *appeal dismissed* "for want of a substantial federal question," 368 U.S. 145, *cert. denied,* 368 U.S. 933;

Royal Commission on Capital Punishment 1949-1953 Report, 173-177, 195.

As the New Jersey Supreme Court significantly observed, "Indeed, legislative specification of criteria for recommendation of life imprisonment might prejudice a defendant through the exclusion by omission of a factor relevant in a given case." *State v. Johnson, supra,* 168 A. 2d at 10-11. Moreover, the California Legislature, by entrusting the decision between life imprisonment and the death penalty to the discretion of the jury, has indicated its belief that jurors understand the factors that are relevant to such a decision. *People v. Polk,* 63 Cal. 2d 443, 451 (1965) [406 P. 2d 641, 646].

It is also

> ". . . a matter of legislative history in most jurisdictions . . . that the conferring of [discretionary] power upon juries is potentially advantageous and, in no way hurtful to persons convicted of first degree murder, for the antecedent statutes rather generally made the death sentence mandatory in all such cases."
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> *In re Ernst's Petition, supra,* 294 F. 2d at 560-561.

Attempts have been made to fashion compulsory checklists for the trial judge or jury where it is bestowed the duty of fixing the punishment in a capital case.[26] Respondent considers unrealistic these efforts to set up preconditions for the exercise of the jury's discretion; the tendency of these proposals is to impel jurors to fit unique factual situations into a mold in making the metaphysical determination whether the defendant in a capital case is fit to live.

By its nature that decision is one which must turn upon intangible considerations such as those consequences of the defendant's acts which are the least capable of precise measurement, the defendant's moral or psychological responsibility, and the relative weight which the individual jurors accord the various objectives of punishment.

No statement could better describe the awesome and complex task conferred upon the jury in a capital case

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[26] *See, e.g.,* N.Y. Penal Law §125.30; Study Draft of a New Federal Criminal Code §§ 3602-3605 (National Commission on Reform of Federal Criminal Laws, 1970); Model Penal Code §210.6 (Proposed Official Draft, 1962); Comment, *Criminal Procedure—Scope of Appellate Review of Sentences in Capital Cases,* 108 U. Penn. L. Rev. 434, 446-447 (1960).

than the words of Justice Schauer, speaking for the California Supreme Court in *People v. Friend*, 47 Cal. 2d 749 (1957) [306 P. 2d 463]:

> "[I]n deciding the question whether the accused should be put to death or sentenced to imprisonment for life it is within their discretion alone to determine, each for himself, how far he will accord weight to the considerations of the several objectives of punishment, of the deterrence of crime, of the protection of society, of the desirability of stern retribution, or of sympathy or clemency, of age, sex, human passion, ignorance or weakness, or (if appropriate under the evidence, of illness or intoxication or provocation not sufficient to reduce the degree or class of the crime), of the presumptions concerning, or possible uncertainties attaching to, life imprisonment, or of the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever which in the light of the evidence, the duty they owe to the accused and to the state, and the law as explained to them by the judge, appears to them to be important." *Id.*, 767-768 [306 P. 2d at 474-475.] *See also Winston v. United States*, 172 U.S. 303, 313.

Would it not strait jacket a jury to require of it the somewhat impossible task of defining the presence (or absence) of specified abstract qualities in the case at hand before permitting it to decide whether the defendant deserves to die? After all, "Jurors are not automatons. They are human beings. The jury system appropriately assumes that jurors in their factual

determinations bring into play their common sense and the experiences of life."

> *Maxwell v. Bishop,* 398 F. 2d 138, 149 (8th Cir. 1968), *rev'd on another ground,* 398 U.S. 262.
>
> *See also People v. Daniels,* 71 Cal. 2d ....., ..., 71 A.C. 1165, 1175 (1969) [459 P. 2d 225, 230-231].

The various efforts toward contriving a binding, formula-type determination on the issue of punishment in a capital case appear to be a step backward from the modern penological view that punishment should fit the perpetrator of the crime and not merely the crime.

> *See Williams v. New York,* 337 U.S. 241, 247; *People v. Friend, supra,* 47 Cal. 2d at 763 (n.7) [306 P. 2d at 471-472].

Petitioner makes the interesting, but logically repugnant, argument that California's procedure, in submitting the question of penalty to the even-handed discretion of the jury with flexible standards and numerous safeguards, is constitutionally inferior to the procedure, such as that of Arkansas' involved in *Maxwell v. Bishop,* 398 F. 2d 138 (8th Cir. 1968), *rev'd,* 398 U.S. 262, which without these standards or safeguards requires the defendant to demonstrate himself an object worthy of the jury's mercy and thus provides a presumptive penalty of death. (Petitioner's Brief, p. 33). *Cf.* 18 U.S.C.A. §1111. Significantly, the procedure approved by petitioner was in earlier times prevalent in California until it was repudiated

as anachronistic and unfair in *People v. Green*, 47 Cal. 2d 209, 224, 231-232 (1956) [302 P. 2d 307, 321-322]. *See also Williams v. New York*, 337 U.S. 241, 247.

Undoubtedly petitioner would have objections to a procedure providing death as the presumed penalty were such a procedure to govern his case. For petitioner to take the position, in this "divide and conquer" strategy, that the absence of fixed standards does not violate the Constitution where the defendant seeks only "mercy" from the jury, but that it does where he starts out with an even break, is to exalt form over substance and ignore the practical reality that jurors in either situation are still merely translating the contemporary values of the community as to punishment into a verdict responsive to the facts set before them. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (n. 15).

One very illuminating reflection of the fairness of a system of criminal procedure is its overall operation as indicated by the cumulative cases of the men who pass through it.

Initially it is significant that only a small percentage of those California defendants convicted of first degree murder have their punishment fixed at death—and that the number of defendants convicted of first degree murder is in turn only a small portion of the total number of defendants convicted of some form of homicide. The following figures are from the files of the Bureau of Criminal Statistics of the California Department of Justice:

TABLE C

MURDER AND MANSLAUGHTER CONVICTIONS AND DEATH SENTENCES FOR MURDER IN CALIFORNIA, 1953-1969

YEAR	FIRST DEGREE MURDER		SECOND DEGREE MURDER	MANSLAUGHTER (Non-Vehicular)
	Total Convictions	Death Sentences	Total Convictions	Total Convictions
1953	45	14 (31%)	63	99
1954	40	8 (20%)	61	110
1955	52	8 (15%)	62	80
1956	61	13 (21%)	61	110
1957**	50	7 (14%)	77	110
1958	72	11 (15%)	86	105
1959	59	12 (20%)	76	133
1960	63	14 (22%)	85	177
1961	106	20 (19%)	91	187
1962	68	11 (16%)	107	181
1963	91	23 (25%)	117	240
1964	69	11 (16%)	105	193
1965	88	16 (18%)	107	235
1966	96	13 (14%)	134	216
1967	88	15 (17%)	131	253
1968	119	17 (14%)	146	282
1969	87	8 (9%)	138	358

*Only death sentences for murder are listed in view of the very small numbe of death sentences imposed for the other capital offenses existing under Californi law. There are eight capital offenses in California: (1) first degree murder (Ca Penal Code § 190), (2) kidnaping for gain with bodily harm (Cal. Penal Cod § 209), (3) assault with a deadly weapon by a life prisoner (Cal. Penal Cod § 4500), (4) train wrecking (Cal. Penal Code § 219), (5) sabotage of war o

(This footnote is continued on the next page)

lease effort with death or great bodily injury (Cal. Mil. & Vet. Code §§ 1670, 672(a)), (6) treason (Cal. Penal Code § 37), (7) procurement of the conviction d execution of any innocent person by perjury or subornation of perjury (Cal. nal Code § 128), and (8) explosion or ignition of a destructive device or ex-losive causing mayhem or great bodily injury (Cal. Penal Code § 12310, effec-e August 19, 1970, as an urgency measure, Cal. Stats. 1970, ch. 771, § ....). he death penalty is mandatory for the offenses listed (6) and (7), as well for the offense listed (3) when the commission thereof results in the th of a non-inmate victim. However, during the last thirty years there ve been no executions in California for offenses (4), (5), (6), or (7). Of 292 executions during that period, 280 were for first degree murder, for kidnaping, and 6 for assault by a life prisoner. U.S. Bureau of Prisons, tional Prisoner Statistics—Capital Punishment 1930-1969 (Table 3) (1970) Preliminary Draft, not yet published). Of the 73 prisoners under sentence of th in California on December 31, 1969, 66 were under sentence for first gree murder, 2 for kidnaping and 5 for assault by a life prisoner. *Id.*, Table 10. r prior years (after 1893, when the State assumed the sheriff's responsibility for cutions), *see Hearings Before the Subcommittee on Criminal Laws and Proce-res of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess. 212-218 970) (indicating executions for only first degree murder, kidnaping, and ault by a life prisoner during that period). Much of the force of capital offense) was sapped by the decision in *People v. Daniels*, 71 Cal. 2d ....., ..., 71 C. 1165, 1175-1186 (1969) [459 P.2d 225, 229-238], excluding from the eration of California Penal Code section 209 those kidnapings which are solely facilitate, and are merely incidental to, the crime of robbery, where the move-ent of the victim does not substantially increase the risk of harm.

**Trials commencing September 11, 1957, and thereafter, have been governed the bifurcated procedure on the issues of guilt and penalty specified by Cali-nia Penal Code section 190.1. It is interesting to note that the institution of furcated proceedings in California does not appear to have had any noticeable dency to increase the percentage of first-degree murderers sentenced to death, ntrary to what has been implied by some commentators. *Cf.* Note, *Executive lemency in Capital Cases*, 39 N.Y.U. L. Rev. 136, 167 (1964). Of course the e is not whether bifurcated proceedings—or the absence of fixed standards—ults in fewer or more verdicts imposing the death penalty; the only constitution-y relevant question is whether the particular state procedure is considered fair der the Fourteenth Amendment's mandate of due process of law.

Secondly, all indications are that a defendant's race plays no pa in the jury's decision whether to fix the penalty at death:

TABLE D

RACE AND THE IMPOSITION OF THE DEATH PENALTY IN CALIFORNIA*

	Caucasian	Negro	Oth
Received in Prison, All Offenses, 1968	72.2%	26.4%	1.4
Rec'vd in Prison, 1st Degree Murder, 1968	60.2%	38.9%	0.9
Under Sentence of Death, All Offenses, 12-31-1969	74.0%	23.3%	2.7
Prisoners Executed, Murder, 1930-1970	75.0%	18.6%	6.4
Prisoners Executed, All Offenses, 1930-1970	75.7%	18.2%	6.1

*Compiled from the latest available information contained in California Depart ment of Corrections, California Prisoners—1968, 46 (Table 18A) (1969); U.S. Bureau of Prisons, National Prisoner Statistics—Capital Punishment 1930 1969 (Table 10) (1970) (Preliminary Draft, not yet published). *See also* Cal fornia Bureau of Criminal Statistics, Crime and Delinquency in California, Supe rior Court Prosecutions—1969, 27 (Table 21) (1970); Special Issue, *A Study of the California Penalty Jury in First-Degree Murder Cases,* 21 Stan. L. Rev 1297, 1301, 1307, 1366-1368, 1421 (1969).

A recent study also indicates no difference in the incidence of the death penalty between cases where the jury included members of racial minority groups and cases where such persons were not included on the jury. Special Issue, *A Study of the California Penalty Jury in First-Degree Murder Cases,* 21 Stan. L. Rev. 1297, 1415 (1969).

Thirdly, probably every California capital case in recent years would have met the test of aggravating circumstances which the proponents of fixed standards have attempted to formulate. Such fixed standards either suggest or require the jury to find that the murder defendant (1) had a previous conviction for murder or some other offense involving the use or threat of

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violence to the victim, (2) have killed more than one victim, (3) have killed a law enforcement officer, (4) have killed for pecuniary gain or during the commission, attempted commission, or flight from the commission or attempted commission of robbery, rape, deviate sexual intercourse by force or threat of force, kidnaping, arson, or burglary, (5) have killed in a particularly heinous, cruel or depraved manner, (6) be a convict under sentence of imprisonment, (7) have knowingly created a great risk of death to many persons, or (8) have killed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody. *See* citations in n.26, *infra.*

Examination of the capital cases decided by the California Supreme Court in the preceding five-year period reveals that the vast majority involves murder committed during the course of a robbery or rape and that many involve the murder of police officers or multiple victims. *Significantly, every single one of the capital cases reviewed by the California Supreme Court during this period includes one or more of the aggravating circumstances enumerated in the above-mentioned fixed standards.*

See cases collected and described in Appendix to Respondent's Brief, *infra.*

> *See also* Special Issue, *A Study of the California Penalty Jury in First-Degree Murder Cases,* 21 Stan. L. Rev. 1297, 1348, 1398, 1407-1408 (1969).

An in-depth study of those persons executed in California during the years 1943-1963 (since then there has been only one execution, in 1967) reveals

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that the foremost characteristic of the capital offense (almost always murder) was robbery in 32% of the cases, sexual attack on a female in 19%, marital arguments in 9.8%, and a prison fight in 7.2%. California Department of Corrections, Executions in California 1943 Through 1963 (Table 30) (1965). *Cf.* Appendix to Respondent's Brief.

These figures also explain the not very surprising fact that most persons who are sentenced to death come from lower social-economic levels, although the occupations of only 50% were unskilled and the largest proportion were of average intelligence and had at least some high school education. *Id.*, Tables 5, 6, and 7. Some commentators have viewed the less-advantaged background of those defendants sentenced to death as indicative of affirmative jury discrimination in singling out such persons for the imposition of capital punishment. *See* Special Issue, *A Study of the California Penalty Jury in First-Degree Murder Cases*, 21 Stan. L. Rev. 1297, 1307, 1367, 1379, 1430-1431 (1969). Other commentators have disputed this conclusion, perhaps observing more sagely that wealthy persons do not customarily engage in the type of activity, such as holding up liquor stores, which so often results in the needless death of the victim and the fixing of the offender's punishment of death. *Cf. Id.*, Preface by H. Kalven, at 1300-1301 ("the authors risk being corrupted somewhat by their passion for turning their findings into constitutional arguments against the death penalty").

In short, the flexible standards provided by California law for the conduct of penalty proceedings do not subject defendants charged with a capital offense to

any unfairness, discrimination, or constitutional deprivation. *See* Royal Commission on Capital Punishment 1949-1953 Report, 208. The actual cases which have passed through the California system demonstrate this individually and collectively, as is evident from the preceding arguments. Furthermore, the arbitrarily fixed formula-type standards sought by petitioner and amici curiae N.A.A.C.P. *et al.* would add nothing constructive to the system and could on the contrary result in both the defense and the prosecution receiving less of a fair trial on the issue whether the defendant is fit to live. *See State v. Johnson, supra,* 34 N.J. 212 (1961) [168 A. 2d 1, 10-11].

One of the foremost commentators on California procedure lists the wide scope of discretion conferred upon the jury under the bifurcated procedure as one of the "factors [which] tend to limit the infliction of the death penalty to extreme cases."

2 Witkin, California Crimes 972-973 (1963).

See also Williams v. New York, 337 U.S. 241, 249;

Royal Commission on Capital Punishment 1949-1953 Report, 208.

It is not difficult to envisage the following situation arising under the type of penalty determination endorsed by petitioner: the defendant's case has one or more aggravating characteristics and does not fit into the slot of any of the "mitigating circumstances" formulated by the proponents of fixed standards. However, the jury is for some reason influenced by one of those intangible factors inherent in the decision of any juror or judge whether to deem one of his fellow

men unfit to live; feeling inclined to extend mercy, the jury nevertheless feels impelled to impose the death penalty because the formula's criteria for death have been met.

Under California law, more than under any system of inflexible standards, it can truly be said that "*under like circumstances* every person convicted of first degree murder has the same chance for leniency as well as the same possibility of receiving the maximum sentence." (Emphasis added.)

In re Anderson, 69 Cal. 2d 613, 628 (1968) [447 P. 2d 117, 127-128].

Cf. Skinner v. Oklahoma, 316 U.S. 535, 538-542;

Yick Wo v. Hopkins, 118 U.S. 356, 368, 373-374.

As has been shown, the vast majority, if not all, of the capital cases from California in the last several years would pass muster under the formula standards. *See* Appendix to Respondent's Brief *infra.* At the same time the proposed standards do not escape the vice of vagueness which they are intended to remedy; on the contrary, they inject into the matter of penalty determination elements less susceptible of definition than any propounded in the standard California jury instructions. Thus the standards in both Model Penal Code section 210.6 (Proposed Official Draft, 1962) and Study Draft of a New Federal Criminal Code section 3605 (National Commission on Reform of Federal Criminal Laws, 1970) resort to making an aggravating circumstance of the fact that the murder was "especially heinous, atrocious or cruel,

manifesting exceptional depravity" and include as mitigation "circumstances which the defendant believed to provide a moral justification or extenuation for his conduct."

Appellate review of a capital case must indeed be complicated rather than facilitated by the imposition of such unwieldy shackles on the jury. One can well imagine the consternation of the appellate court called upon to evaluate an appellant's contention that, contrary to the apparent findings of the jury, the offense was not "especially heinous" and the evidence of "circumstances which the defendant believed to provide extenuation" not insufficient. It is at best doubtful that, in the context of the requirements of the due process clause, jury determinations under the proposed inflexible standards would approximate "findings adequate to make meaningful any appeal." The same is true with respect to the approach suggested by petitioner. (Petitioner's Brief, p. 27 (n. 19)).

Specht v. Patterson, 386 U.S. 605, 610.

See also Garner v. Louisiana, 368 U.S. 157, 173.

Respondent does not concur in petitioner's statement that the practicability of devising workable standards for the determination of penalty is substantively different from the admitted impracticability of devising workable standards for the placement of monetary value on pain and suffering in a personal injury case. (Petition, pp. 28-29.) *Cf. Beagle v. Vasold,* 65 Cal. 2d 166, 172, 179-180 (1966) [417 P.2d 673, 675, 680-681]. Indeed, petitioner's effort to venture a

"general suggestion" as to "acceptable standards"[27] echoes the frustration of his confreres in grappling with the definition of such imponderables.

Respondent submits that fixed standards are totally inappropriate to a penalty jury's determination under contemporary community standards whether the defendant is fit to live, just as would be the imposition of such computer-type decision-making on the processes by which trial judges are called upon to decide probation and sentencing matters, *see Williams v. New York*, 337 U.S. 241, 244-249, 251, and other governmental entities are delegated the responsibility of deciding whether to prosecute, *see Oyler v. Boles*, 368 U.S. 448, 454-456, or whether to grant parole and clemency applications. *See Williams v. New York, supra* at 248; Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. Rev. 136, 159-177 (1964.)

Carried to its logical extreme, the approach taken by petitioner and *amici curiae* N.A.A.C.P. *et al.*, is that the exercise of all discretion in capital cases must be stamped out, including presumably the prosecuting attorney's discretion under California law whether or not to seek the death penalty. *See People v. Siplinger*, 252 Cal. App. 2d 817, 819 (1967) [60 Cal. Rptr. 914, 916]. The end result of this approach would of course be two equally unacceptable alternatives: judicial abolition of the States' right to prescribe the death penalty as an alternate punishment for murder, or a mandatory penalty of death for that offense.

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[27]Petitioner's Brief, p. 27 and n.19 ("Consideration of the choice of penalty could be centered around these objectives [of penalty], with a view of choosing that one which, having regard to the circumstances of the case and the character and temperament of the defendant, would most nearly further rather than frustrate them.")

II

All Indications Afforded by the Record Impel the Conclusion That the Jury Acted on Constitutionally Permissible Grounds, Rather Than Arbitrarily, in Fixing Petitioner's Punishment at Death and His Codefendant's at Life Imprisonment

Respondent has demonstrated in the preceding argument that the procedure for the conduct of capital cases, including particularly the standards guiding the jury in its deliberations on the issue of penalty, is exceedingly fair to both sides in its general operation as well as in its application to specific cases. But even were this not the case, the various indications afforded by the record in the instant case establish that *petitioner* received a fair trial and preclude his attacking the constitutionality of the California procedure on grounds that have no application to himself or his situation.

United States v. Raines, 362 U.S. 17, 21;
In re Cregler, 56 Cal. 2d 308, 313 (1961) [363 P.2d 305, 307-308].

There are several indicia of a constitutionally permissible basis for *this* jury's determination on the issue of penalty and no indicia of an impermissible basis for the penalty verdicts: (1) the *voir dire* examination of the twelve jurors, (2) what the jury was told in the opening statement, (3) the evidence received at the guilt and penalty phases of the trial, particularly that evidence which was read back to the jury at its specific request, (4) the closing arguments made to the jury, and (5) the jury instructions, one of which was given in response to a question troubling the jury.

A. The Voir Dire Examination of the Twelve Jurors Affirmatively Reflects Their Willingness to Decide the Issue of Penalty on the Evidence Received in Court and the Law Given Them by the Trial Judge, and to Disregard Racial Considerations, Petty Biases, and Personal Preconceptions

The case at bar provides a graphic illustration of the vital part played by the wide-ranging *voir dire* examination of prospective jurors allowed in California in educating the jurors as to their proper function in a capital case:

1. *Juror Kischell*: In the *voir dire* examination of Mrs. Kischell she was asked, "assuming we reach the penalty stage of the murder prosecution, and that the law, in a sense, gives you very few guidelines. That in a sense it says you decide it based upon the facts that have been presented to you and whatever other competent evidence is before you on what should happen to these persons. Do you feel you could do this?" She replied, "I think so," and answered affirmatively when asked, "You must decide upon the facts and the law and nothing else?" She also responded affirmatively to the request of one of defense counsel that she let the court or counsel know if she thought of any reason why she could not be a fair and impartial juror in the case. (App. p. 39.)

Defense counsel also made it clear to Mrs. Kischell and the other jurors that they were to exclude from their consideration the fact that both defendants were Negroes, and to exclude as well any prejudices which the jurors might have:

"Q And, again, I will ask the question, the fact that a person is of a different racial origin, that this is the United States of America and it can't make any difference; you understand that; don't you?

A That's right.

Q You know that even though there have been problems with certain groups that have come about, this can't color you thinking. You must decide on these persons as human beings and individuals; you understand that, don't you?

A Yes.

Q And none of the prejudices that all of us have to some degree, or none of these sympathies that all of us have to some degree can enter into your verdicts; you understand that?

A Yes." (App. p. 39.)

2. *Juror Perez:* Asked whether his answers to the previous questions would have differed, he answered in the negative. He stated that he understood when told by defense counsel that "the verdict that we want must be based on the evidence and the law and nothing else," and that the same thing applied, "assuming you get to the penalty phase." (App. pp. 42-43.)

3. *Juror Thomas:* This juror too indicated his agreement with the answers given by the preceding jurors (App. pp. 43, 44) and his willingness "to take each of the defendants as an individual human being and judge him alone . . . if the proper time [the penalty phase] comes." (App. p. 43.)

4. *Juror Janssen:* Mrs. Janssen indicated that her answers to the questions propounded to the other jurors would be the same. (App. p. 51.) She agreed to "take the evidence from one source and one source only and that is here in the courtroom as it is received during the course of the trial" and to follow the law as stated by the trial court. (App. p. 47.)

5. *Juror Wain:* He too would have answered the preceding questions in the same manner (App. pp. 56-57) and agreed to "decide this case based upon the evidence as it is received here in court during the course of trial and based upon the law as it will be stated." (App. p. 53).

Mr. Wain understood that "although a person may be of a different race . . ., he is entitled to the same protection of the law as all of us." He had no "qualms about enforcing the law properly, fairly, and honestly, no matter what the person is as far as his background" (App. p. 56) and recognized "that it would be improper . . . to advocate certain enforcements or non-enforcements of the penalty based upon sympathies or prejudices that you may have." (App. p. 54.)

6. *Juror Welker:* Mrs. Welker stated her willingness to "take the evidence from the witness stand and from that source alone" and to follow the law as stated by the trial court. (App. p. 59.) She refused to allow prejudices to enter into her judgment (App. p. 61), and nothing led her to believe that she would be less than fair and impartial in trying the case. (App. p. 62.)

7. *Juror Fogel:* She would not amplify any of the answers given by the previously-questioned jurors (App. p. 65), and the questions did not suggest any reason why she could not sit on the case. (App. pp. 63-64.)

She agreed to take the evidence from the witness stand alone and to follow the law as instructed by the court (App. p. 65), indicating her awareness that the decision as to punishment must be made on the basis of those factors alone and not on "peronal feelings or any outside factors." (App. pp. 65-66.)

Mrs. Fogel made it clear that she would not be influenced by any tactic followed by defense counsel (App. p. 67) or by racial or other prejudice:

"Q The fact that the persons involved are of a different racial origin, would this make any difference to you?

A No.

Q The fact that there has been a considerable amount of problems recently because of the racial factor in the United States, would this cause you to feel biased or prejudiced in any way that would apply against my defendant or Mr. McGautha?

A No, sir.

Q You understand, I'm sure, if you analyze your own feelings, that in some way all of us have little petty biases and prejudices that we have built up over the years. These can have no bearing in this case; you understand that, do you not?

A Yes, I do.

. . .

Q . . . [W]hen we look at our every day life sometimes we see a person, we don't like them, we don't like his looks, maybe, and this is the type of thing I had in mind; you understand that?

A Yes." (App. pp. 66-67.)

8. *Juror Grant:* Her answers to the preceding questions would have been the same. (App. p. 70.) She agreed to "take the evidence from the witness stand and as it is received here in court during the course of the trial and from that source alone." (App. p. 69.)

9. *Juror Hamblin:* None of the answers of the other jurors would be amplified by Mr. Hamblin. (App. p. 72.) He indicated his willingness to take the evidence from the witnesses and the physical exhibits alone (App. p. 71) and to arrive at a verdict based on those matters alone. (App. pp. 72-73.)

10. *Juror Braun:* She agreed to consider only the evidence received in the course of the trial (App. p. 74) and to render both sides a completely fair and impartial trial "based on the evidence and the law alone." (App. p. 75.)

11. *Juror Barden:* None of the questions directed to the other jurors suggested to her a different response on her part. (App. p. 77.) Mrs. Barden was willing to make a determination on the issue of punishment based on the evidence and the law as given by the trial court. (App. p. 78.)

12. *Juror Haskell:* He would not amplify the answers given by the preceding jurors. Mr. Haskell knew of no reason why he could not "render a completely fair and impartial verdict based upon the evidence and the law." (App. p. 79.)

B. The Opening Statement at the Penalty Phase of the Trial Outlined the Proper Criteria for the Jury to Consider in Evaluating the Forthcoming Evidence

Codefendant Wilkinson's counsel made an opening statement to the jury at the commencement of the penalty phase of the proceedings; the prosecuting attorney and petitioner's counsel chose not to. (App. pp. 81, 83.) This opening statement apprised the jury of their forthcoming task—to make their choice of penalty in light of the evidence concerning the offense as well as on the basis of the life background of the two defendants:

> "In this proceeding each person is an individual human being. He is to be judged as an individual and what Mr. Wilkinson says, he is doing it because I am going to put him on the stand and I feel it is important for you to know something about his background when you go in that jury room and decide whether or not he should live or die, and in doing this I have to bring out certain things that may not be of help, and it could be, in a sense, a hindrance to Mr. McGautha, but I am not doing it to hurt Mr. McGautha. I am not doing it to throw the blame over on any other person.
>
> "I am merely doing it so that you will have a complete and, what I hope is, an over-all picture of what took place involving the robbery that caused the death of Mr. Smetana." (App. p. 82.)

C. The Evidence Before the Jury Indicates That It Was Discriminating and Not Discriminatory in Distinguishing Between the Two Defendants in the Fatal Robbery: Petitioner Was a Likely Candidate for the Death Penalty Under Any Conceivable Standards, Having Been the "Trigger Man," Fifteen Years Senior to His Codefendant, and Previously Convicted of Four Felonies, One of Them Another Murder

In the presentation of its case on the issue of penalty, the prosecuting attorney relied primarily on the evidence received at the guilt phase. She offered no additional testimony and only a physical exhibit consisting of documents establishing petitioner's four prior felony convictions in Texas for theft over $50 (1943), robbery (1943), murder without malice (1948), and robbery by assault (1952). No effort was made by the prosecution to delve into the details of these offenses or to present additional evidence of bad acts on the part of petitioner.

The opinion of the California Supreme Court accurately summarizes the evidence received at the guilt phase of the trial concerning the relative responsibility of petitioner and codefendant Wilkinson for the death of Mr. Smetana. (*See* App. pp. 250-252, quoted *infra*, pp. 5-8.) It is apparent that petitioner, by his own admission, fired the sole shot during the robbery, killing Mr. Smetana, *id.*, and that the jury placed emphasis on this fact in arriving at its determinations on the issue of penalty. Significantly the jury asked to have read back to them the testimony of four persons who were witnesses either to the shooting itself or to petitioner's subsequent statements relating thereto. Shortly after the reading of the last two such witnesses' testimony, the jury returned its final verdicts. (App. pp. 225-231.)

The evidence indicates not only that petitioner killed during the course of a robbery, but that the killing involved premeditating reflection on his part. The death of Mr. Smetana was gratuitous in that it was totally unnecessary in effecting the robbery. Exercising his right to take the stand at the penalty proceedings although he had waived that right at the guilt phase, petitioner admitted that Mr. Smetana was unarmed (App. p. 182), as were the other persons present, Mrs. Smetana and the unknown customer. No one offered forcible resistance to the two gunmen, so there was no panic on the part of petitioner.

Most pathetically, Mr. Smetana was of such slight build and height that he could have offered no threat to petitioner. As the prosecuting attorney characterized the evidence to the jury, a "big man might pose some threat to a person just by reason of his size, but you have the autopsy report. Mr. Smetana was . . . five feet three inches tall. He weighed 135 pounds. I would suggest Mr. Smetana could have been robbed even without a gun. He could have been robbed by force, and yet here he was killed for no reason." (App. p. 198.)[28] And for what did petitioner, who drove a Cadillac (App. p. 135), kill Mr. Smetana?—"in the neighborhood of twenty some dollars" and a bottle of wine. (App. pp.122, 192.)

When the offenses were committed, petitioner was 41 years of age (App. p. 159) and Wilkinson 25 years of age. (App. pp. 2-3, 132.) The evidence indicates that it was petitioner who planned and directed the fatal robbery (*see infra*, pp. 7-8, 10-11). Wilkinson

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[28]*See also* the Reporter's Transcript in the state court proceedings, p. 308. Mr. Smetana was 52 years of age. *Id.*

for the most part accepted responsibility for his acts, cooperated with the police (App. p. 101), and felt actual remorse (App. p. 112), whereas petitioner attempted to place all the blame on Wilkinson.

Petitioner lied and contradicted himself on the witness stand (*see* App. pp. 192-193, 203-206), admitting in one instance that he had lied. (App. p. 176.) For example, petitioner denied to the police that he had ever had a .38 caliber revolver (the murder weapon) (App. pp. 180-181) even though, as he admitted on the witness stand, he had 2½ years earlier pleaded guilty to carrying such a weapon. (App. p. 177.) An undercover police officer testified that he had seen the murder weapon at petitioner's home on numerous occasions and that on one such occasion petitioner demonstrated to him how quickly petitioner could draw the weapon from his waistband. (App. pp. 136-138, 140.) Yet petitioner denied ever having demonstrated his ability to perform this act and denied knowing the officer. (App. pp. 174, 178.)

Petitioner admitted to being convicted of robbery in 1943, serving a term of imprisonment therefor until 1946, being convicted in 1948 of murder and serving state prison time until 1949 and being convicted of robbery by assault in 1952, and serving state prison time until 1958. (App. pp. 162-163.) Although he had pleaded guilty to the two robberies and prior to the impaneling of the jury admitted each of the four prior felony convictions alleged in the information (App. pp. 35-37), petitioner told the jury that he "didn't actually commit" the two robberies. (App. pp. 174-175.)

The wantonness of petitioner's conduct in the fatal robbery, his mendacity, and his unwillingness to ac-

cept responsibility for his current and past criminal behavior contrasted vividly with what the jury learned concerning his codefendant.

Prior to the present offense Wilkinson had led a relatively crime-free life, having no previous convictions and only a single arrest arising out of some bad checks cashed by his girl friend. (App. pp. 86-87, 102.) His past disclosed a rather difficult childhood (App. pp. 84-85), a low I.Q. (in the eighties) resulting in an Honorable Discharge from the Army (App. pp. 85-86), and constant efforts to remain gainfully employed and to send money to his family in Mississippi. (App. pp. 87-88.) His actual initiation in the world of crime came at the hands of petitioner and petitioner's associates at a time when Wilkinson was unemployed and in need of money. (App. pp. 89-92.) Unlike petitioner, Wilkinson was able to persuade several character witnesses, including a Baptist minister, to testify on his behalf as to Wilkinson's good reputation, nonviolent nature, and church attendance. (App. pp. 141-158.)

In light of the foregoing it is evident that the jury was being discriminating, rather than discriminatory, in fixing petitioner's punishment at death and his codefendant's at life imprisonment. The different punishment accorded the two defendants was anything but "capricious and arbitrary." (Petitioner's Brief, p. 25.)

The comments of the trial judge, who sat as much more than a "thirteenth juror" in observing the witnesses' demeanor and reweighing the evidence on motion for new trial and reduction of punishment, *People v. Robarge*, 41 Cal. 2d 628, 633-634 (1953) [262 P. 2d 14, 17-18], serve as a further clue as to what fac-

tors the jury deemed most significant in fixing petitioner's penalty at death:

> ". . . I have given this case long and careful thought. I listened to the evidence carefully as it was presented to the jury both at the time of the guilt phase and at the time of the penalty phase. I am satisfied that this was a vicious, unmitigated, unjustified killing.
>
> "This is the second human life that has been lost at the hands of Dennis McGautha, one in Texas and one in California." (App. p. 243.)

Respondent has attempted to demonstrate in the preceding arguments how the inflexible standards elsewhere proposed comprise an unwieldy and unworkable approach to the problem of penalty determination insofar as the proponents of these standards would impose them on all capital cases in all jurisdictions having the death penalty. Nevertheless it bears mention, in evaluating petitioner's claim that he personally was denied a fair trial, that the penalty determination in his case would pass muster under any of the proposed standards.

One must assume, in the absence of any indication to the contrary, that the jury based its decision on the evidence before it, as it was instructed to do by the court (*see* App. p. 222) and by counsel during the *voir dire*. (*See* Argument II(A), *infra*.) That evidence, insofar as it related to the appropriate punishment for petitioner, met at least three of the "aggravating circumstances" criteria of Model Penal Code section 210.6,[29]

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[29]These three criteria comprise previous conviction of another murder or violent offense, commission of the murder during the course of a robbery or other enumerated offense, and the murder being "especially heinous, atrocious, or cruel."

any one of which criteria is sufficient under the proposed standard. Petitioner met none of the eight "mitigating circumstances" criteria.

As to Wilkinson, the sole aggravating circumstance was that he was a participant in the commission of the robbery. Wilkinson meets three or four of the mitigating circumstances criteria: his youth, his lack of a "significant history of prior criminal activity," that he was "an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor," and perhaps that he acted "under the domination of another person." *See also* Study Draft of a New Federal Criminal Code § 3605 (National Commission on Reform of Federal Criminal Laws, 1970).

In short, it is inconceivable that the giving of any set of fixed standards, such as those suggested by petitioner, *amici curiae* N.A.A.C.P. *et al.*, or various commentators, would have altered the jury's decision that Wilkinson was fit to live and petitioner should die.

D. The Prosecuting Attorney's Argument to the Jury, Restrained and Confined to Permissible Matters, Served With Defense Counsel's Arguments to Focus the Jury's Attention on the Proper Factors to Be Considered on the Issue Whether the Defendants Were Fit to Live

The argument of the prosecuting attorney to the jury in the instant case was a model of restraint. There was no reference to anything outside the record, except to what was everyday common knowledge, nor did she argue impermissible matters or attempt to inflame the jury with appeals to passion. Her remarks were primarily a lady-like interpretation of the evidence on the issue of guilt, with mention of the defendants' demeanor

and truthfulness on the witness stand and their past criminal history. She also alluded to the need to protect society, a permissible objective of punishment. (App. pp. 194-206.)

Significantly, the prosecuting attorney's argument ended with the following sentence: "Seriously consider whether or not the death penalty should be imposed on both defendants, and as to the person who was Benjamin Smetana's killer fix the penalty at death." (App. p. 206.)

The argument of Wilkinson's counsel succinctly instructed the jury as to the manner in which it should approach its weighty responsibility:

> "In determining the fate that shall befall [the defendant in a capital case] you have to determine it by, I think, three things.
>
> "One, what kind of a person was he before the act that caused the death of an innocent party.
>
> "Two, what was his involvement in this activity that caused the death of an innocent human being, and,
>
> "Three, what was his reaction afterwards, because I think all three are of equal importance." (App. p. 208.)

This approach, however, could not be taken by petitioner's counsel in view of the dismal showing that his client would make on such criteria. The strategy of petitioner's counsel was to face this reality head-on and admit:

> "[M]y client, Dennis Councle McGautha [,] is not good. He is the scum of the earth. He has been in and out of trouble all of his life." (App. p. 218.)

". . . I am not trying to minimize anything in the background of Dennis Councle McGautha, attempting to minimize his past life.

"It is bad. It is putrid, and he is a liar." (App. p. 219.)

What was there good to say about petitioner? His counsel adopted what was probably the best available tack, an attempt to persuade the jury that there was real doubt as to whether it was Wilkinson rather than petitioner who was the "trigger man," and an emotional plea throwing his client on the mercy of the jury.

Divergent as they were, the arguments of the three parties served admirably to focus the attention of the jury on the proper factors to be considered in making the awesome decision whether the two defendants were fit to live.

E. The Instructions Given on the Issue of Punishment Directed the Jury's Attention to Constitutionally Permissible Criteria, and the Instruction on Possibility of Life Sentence Parole, Given in Response to a Jury Request, Demonstrates That the Jury Based Its Decision Partly on a Concern That Petitioner Be Precluded From Killing a Third Time

The standard instructions on penalty determination in a capital case were given (*see* App. pp. 221-223, quoted *infra*, pp. 26-29). The constitutional validity of these instructions has been discussed in Arguments I(A) and I(F), *infra*.

Respondent therefore merely wishes to stress at this juncture that the jury was instructed that its authority on the matter of punishment "is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of

law stated to you." The jurors were told to "conscientiously and reasonably consider and weigh the evidence" to reach a "just verdict." They were told that "in this part of the trial the law does *not* forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; however, the law does forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling." (Emphasis added.) In arriving at their decision the jurors were told that they "should consider all of the evidence received here in court" and that they could "also consider all of the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court." It was made clear to the jury that evaluation of these various factors was left to their "judgment, conscience, and absolute discretion." (App. pp. 221-223.)

Respondent submits that the foregoing instructions were constitutionally permissible, scrupulously fair, and highly appropriate for this case. In fact respondent can conceive of no instruction which would better reflect and define the duties conferred upon the jury in fixing petitioner's and Wilkinson's punishment. It is also significant that petitioner did not request that any different standards be given to the jury in the instructions. (*See* App. pp. 16-29.)

> *See Maxwell v. Bishop*, 398 F.2d 138, 149 (8th Cir. 1968), *rev'd on another ground*, 398 U.S. 262.

Significantly, the jury did ask for and receive a further instruction which casts some light on the basis

for its penalty verdicts. The following note was conveyed to the trial judge by the jury during the course of its deliberations: " 'A note from instructions. "Confinement in the state prison for life." Does this mean that there is no possibility of parole?' " The trial judge responded by giving the standard California jury instruction on this subject (App. pp. 224-225, discussed *infra*, pp. 30-31). This instruction informed them that a prisoner under life sentence may be paroled or may spend the remainder of his natural life in prison, and that the jury was not to attach significance to the possibility of parole. (App. pp. 224-225.) The instruction did not inform the jury that a life prisoner may be released after serving seven years of his term. Cal. Penal Code § 3046.

Nevertheless, the fact that the jury initiated the inquiry into this area suggests that they were concerned about the possibility that petitioner, if given a life sentence, would constitute a continuing threat to society. Such a concern on the part of the jury was probably motivated by petitioner's previous murder conviction, the pointless nature of the murder in the present case, and the lack of remorse shown by petitioner on the witness stand.

Available information suggests that the jury was correct if it concluded that protection of society requires imposition of the death penalty in some cases:

> "The number of cases in California of persons with previous convictions of murder who, after release from prison, murder again is not insignificant. Files of the Los Angeles Police Department alone in 1959 showed no less than ten killers sentenced to 'life' imprisonment who were freed only to kill

again. [Citing The Los Angeles Times, January 18, 1959.] Other cities and states have had similar experiences."

J. F. Coakley, *Capital Punishment*, 1 Am. Crim. L. Quarterly 27, 43 (May, 1963).

See also n. 18, *infra* (homicides committed by prisoners in custody.)

Finally, it should be noted that the jury was not hasty in arriving at its penalty verdicts. It spent one and a half days deliberating the issue of penalty, more time than it did on the issue of guilt. (App. pp. 11, 16, 30, 224-231.) The foreman informed the judge that the penalty verdicts were reached "after much sincere deliberation." (App. p. 231.)

These various indicia—the *voir dire* examination of the jurors, the opening statement, the evidence, the closing arguments, and the instructions—demonstrate affirmatively that the record in petitioner's case affords no basis whatsoever for the claim that the absence of fixed standards on the matter of punishment deprives a defendant in a capital case of due process of law.

Conclusion

It is of major interest that in Great Britain *both opponents and proponents* of capital punishment recognized the unfeasibility of arbitrarily fixed standards of the type whose absence, it is contended by petitioner and *amici curiae* N.A.A.C.P. *et al.*, infects with unconstitutionality the procedures followed by the federal government, California, and 38 of the other 40 States having

the death penalty.[80] As the Royal Commission stated in its report,

> "There are strong reasons for believing that it must inevitably be found impracticable to define a class of murders in which alone the infliction of the death penalty is appropriate. The crux of the matter is that any legal definition must be expressed in terms of objective characteristics of the offence, whereas the choice of the appropriate penalty must be based on a much wider range of considerations, *which cannot be defined but are essentially a matter for the exercise of discretion.*
>
> ". . .
>
> ". . . the factors which determine whether the sentence of death is the appropriate penalty in particular cases are *too complex to be compressed within the limits of a simple formula;* . . . among the most important factors are the motive of the offence and the character and circumstances of the offender, which can never be inferred from the legal quality of his criminal act." (Emphasis added.)
>
> Royal Commission on Capital Punishment 1949-1953 Report, 173-174.

The Royal Commission concluded:

> ". . . We began our inquiry with the determination to make every effort to see whether we could succeed where so many have failed, and discover some effective method of classifying murders so as

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[80]There are two States in which the death penalty, where provided by law, is mandatory. *See* Special Issue, *A Study of the California Penalty Jury in First Degree Murder Cases,* 21 Stan. L. Rev. 1297, 1437 (1969).

> to confine the death penalty to the more heinous . . . We conclude with regret that the object of our quest is chimerical and that it must be abandoned." *Id.*, 189.

Resolution of the issue presented in the case at bar does not, however, depend upon whether or not one agrees with the findings of the Royal Commission. In view of the "importance of allowing the States to experiment and innovate, especially in the area of criminal justice," *California v. Green*, 399 U.S. 149, 171 (Burger, C. J., concurring), it is essential not to lose sight of the fact that "the question for decision is not whether we applaud or even whether we personally approve the procedures followed. . . . The question is whether those procedures fall below the minimum level the Fourteenth Amendment will tolerate. . . ."

> *Spencer v. Texas*, 385 U.S. 554, 569 (Stewart, J., concurring.)

Respondent State of California earnestly maintains that the standards which California provides to guide the jury in the exercise of its discretion on the issue whether a defendant in a capital case is fit to live, in conjunction with the innumerable procedural safeguards attending the conduct and review of capital cases in California, comport with the Fourteenth Amendment's guarantee of due process of law. Moreover, "[w]hat we are concerned with here is [petitioner's] case and only [petitioner's] case,"[31] and the record affirmatively indicates that petitioner received a trial consistent with the highest standards of fairness. It is therefore urged

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[31] *Maxwell v. Bishop*, 398 F. 2d 138, 147 (8th Cir. 1968), *rev'd*, 398 U.S. 262.

that the judgment of the California Supreme Court upholding petitioner's judgment of conviction imposing the death penalty be affirmed in its entirety.

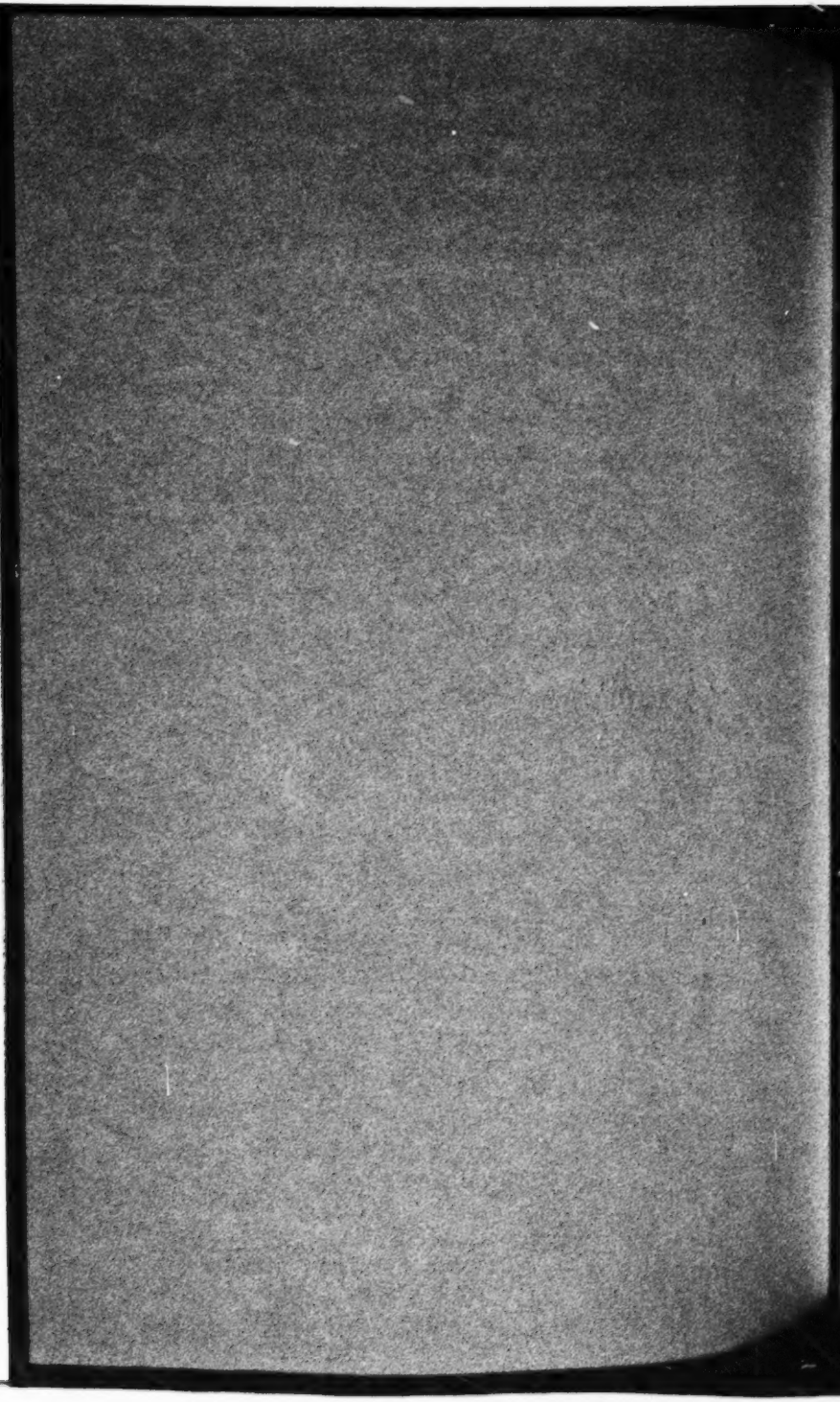
Respectfully submitted,

THOMAS C. LYNCH,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

RONALD M. GEORGE,
Deputy Attorney General of the State of California,

Attorneys for Respondent.



APPENDIX

Defendants Under Sentence of Death Reviewed by the California Supreme Court, 1965-1970*

I CAPITAL CASES REVIEWED BY THE CALIFORNIA SUPREME COURT BETWEEN SEPTEMBER 1, 1965, AND SEPTEMBER 1, 1967.

A. *Direct Appeals Affirmed in Entirety*

People v. Jacobson, 63 Cal. 2d 319 (1965) [405 P. 2d 555] (premeditation and exceptional heinousness —drowning of 21-month-old child; *commuted* by Governor in 1966); *People v. Cotter,* 63 Cal. 2d 386 (1965) [405 P. 2d 862] (robbery; *commuted* by Governor in 1966); *People v. Mathis,* 63 Cal. 2d 416 (1965) [406 P. 2d 65] (robbery); *People v. Gilbert,*[1] 63 Cal. 2d 690 (1965) [408 P. 2d 365], *rev'd,* 388 U.S. 263 (robbery, victim police officer); *People v. Smith,* 63 Cal. 2d 779 (1966) [409 P. 2d 222] (burglary, double murder, both victims police officers); *People v. Mitchell,* 63 Cal. 2d 805 (1966) [409 P. 2d 211] (robbery, victim police officer) [defendant sole person to be executed in California from 1964 to the present]; *People v. La Vergne,* 64 Cal. 2d 265 (1966) [411 P. 2d 309] (robbery); *People v. Anderson,* 64 Cal. 2d 633 (1966) [414 P. 2d 366] (robbery, and attempt

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*The cases listed in this appendix form the basis for the compilations which appear in Table A at page 49 of Respondent's Brief. In approximately 5% of the cases jury trial was waived and the issue of penalty tried to the court. The vast majority of these 128 cases involves the offense of first-degree murder, and the remaining few involve the offenses of kidnapping for gain with bodily harm or assault with a deadly weapon or with force likely to produce great bodily injury, by a prisoner under life sentence. Cal. Penal Code, §§ 187, 209, 4500.

[1]This case is listed twice, as an affirmance as to one murder count and as a reversal as to the other murder count.

to kill two police officers and a fourth victim); *People v. Talbot,* 64 Cal. 2d 691 (1966) [414 P. 2d 633] (robbery, mutilation); *People v. Reeves,* 64 Cal. 2d 766 (1966) [415 P. 2d 35] (robbery, and attempt to murder a second victim, court trial); *People v. Seiterle,* 65 Cal. 2d 333 (1966) [420 P. 2d 217] (robbery, double murder); *People v. Roberts,* 65 Cal. 2d 514 (1966) [421 P. 2d 420] (robbery); *People v. Thomas,* 65 Cal. 2d 698 (1967) [423 P. 2d 233] (arson and exceptional heinousness—molotov cocktail thrown into bedroom of three-year-old victim; *commuted* by Governor in 1967); *People v. Tahl,* 65 Cal. 2d 719 (1967) [423 P. 2d 246] (robbery, double murder, subsequent murder, subsequent attempt to kill fourth person, and statement of intention to kill fifth person); *People v. Saterfield,* 65 Cal. 2d 752 (1967) [423 P. 2d 266] (premeditation, double murder, prior murder conviction); *People v. Arguello,* 65 Cal. 2d 768 (1967) [423 P. 2d 202] (robbery, exceptional heinousness—82-year-old victim beaten to death with brick and hammer); *People v. Hillery,* 65 Cal. 2d 795 (1967) [423 P. 2d 208] (rape of 15-year-old victim); *People v. Sanchez,* 65 Cal. 2d 814 (1967) [423 P. 2d 800] (murder of civilian prison employee by prisoner serving life sentence); *People v. Eli,* 66 Cal. 2d 63 (1967) [424 P. 2d 356] (rape); *People v. Lookadoo,* 66 Cal. 2d 307 (1967) [425 P. 2d 208] (robbery and exceptional heinousness —setting live victim on fire with burning gasoline, court trial; *commuted* by Governor in 1966); *People v. Hines,* 66 Cal. 2d 348 (1967) [425 P. 2d 557] (robbery); *People v. Hill & Saunders,* 66 Cal. 2d 536 (1967) [426 P. 2d 908] (robbery, second murder attempted, two capital defendants); *People v. Modesto,* 66 Cal. 2d 695 (1967) [427 P. 2d 788] (double murder,

exceptional heinousness—committing sexual acts upon,[2] and beating to death, nine and twelve-year-old victims with sledgehammer, prior murder); *People v. Massie,* 66 Cal. 2d 899 (1967) [428 P. 2d 869] (robbery, second murder attempted, court trial).

B. *Direct Appeals Reversed as to Death Penalty, Conviction, or Both*

People v. Anderson, 63 Cal. 2d 351 (1965) [406 P. 2d 43] (premeditation, sexual acts upon ten-year old female victim); *People v. Price,* 63 Cal. 2d 370 (1965) [406 P. 2d 55] (robbery, double murder, both victims police officers); *People v. Polk & Gregg,* 63 Cal. 2d 443 (1965) [406 P. 2d 641] (robbery, heinous mutilation of victim, and evidence of prior homicides by one of the two capital defendants); *People v. Luker,* 63 Cal. 2d 464 (1965) [407 P. 2d 9] (robbery); *People v. Stockman,* 63 Cal. 2d 494 (1965) [407 P. 2d 277] (robbery); *People v. Arguello,* 63 Cal. 2d 566 (1965) [407 P. 2d 661] (robbery, exceptional heinousness—82-year-old victim beaten to death with brick and hammer); *People v. Gilbert,* 63 Cal. 2d 690 (1965) [408 P. 2d 365] (robbery); *People v. Ketchel & Sears,* 63 Cal. 2d 859 (1966) [409 P. 2d 694] (robbery, victim police officer, two capital defendants); *People v. Treloar,* 64 Cal. 2d 141 (1966) [410 P. 2d 620] (robbery); *People v. Ford,* 65 Cal. 2d 41 (1966) [416 P. 2d 132] (robbery, premeditation, victim police officer); *People v. Butler,* 65 Cal. 2d 569 (1967) [421 P. 2d 703] (robbery); *People v. Goedecke,* 65 Cal. 2d

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[2]Rape, sodomy, sexual perversion, and other sexual offenses punishable under the California Penal Code, when committed upon a child under the age of fourteen, are punishable under section 288 of the code as the separate offense of lewd or lascivious acts upon the body of a child under the age of fourteen.

850 (1967) [423 P. 2d 777] (premeditation, quadruple murder); *People v. Nicolaus*, 65 Cal. 2d 866 (1967) [423 P. 2d 787] (premeditation, triple murder); *People v. Spencer*, 66 Cal. 2d 158 (1967) [424 P. 2d 715] (robbery, second murder attempted); *People v. Griffin*, 66 Cal. 2d 459 (1967) [426 P. 2d 507] (rape); *People v. Gonzales*, 66 Cal. 2d 482 (1967) [426 P. 2d 929] (robbery, second murder attempted); *People v. Pennington*, 66 Cal. 2d 508 (1967) [426 P. 2d 942] (double murder and sexual acts upon a female murder victim under the age of fourteen); *People v. Bandhauer*, 66 Cal. 2d 524 (1967) [426 P. 2d 900] (robbery); *People v. Wilson*, 66 Cal. 2d 749 (1967) [427 P. 2d 820] (premeditation, double murder); *People v. Varnum*, 66 Cal. 2d 808 (1967) [427 P. 2d 772] (robbery); *People v. Powell & Smith*, 67 Cal. 2d 32 (1967) [429 P. 2d 137] (premeditation, double murder, both victims police officers, two capital defendants); *People v. Jackson*, 67 Cal. 2d 96 (1967) [429 P. 2d 600] (rape, offense committed only a few days after defendant's release from nine-year prison term, court trial).

C. *Writs Denied After Issuance of Order to Show Cause*

None.

D. *Writs Granted Setting Aside Death Penalty, Conviction, or Both*

In re Spencer, 63 Cal. 2d 400 (1965) [406 P.2d 33] (robbery); *In re Varnum*, 63 Cal. 2d 629 (1965) [408 P.2d 97] (robbery); *In re Pike*, 66 Cal. 2d 170 (1967) [424 P.2d 724] (robbery, victim police officer); *In re Shipp*, 66 Cal. 2d 721 [427 P.2d 761] (robbery, victim killed for 10¢).

II CAPITAL CASES REVIEWED BY THE CALIFORNIA SUPREME COURT BETWEEN SEPTEMBER 1, 1967, AND SEPTEMBER 1, 1970

A. *Direct Appeals Affirmed in Entirety*

People v. Lara, 67 Cal. 2d 365 (1967) [432 P.2d 202] (robbery); *People v. Beivelman*, 70 Cal. 2d 60 (1968) [447 P.2d 913] (robbery and exceptional heinousness—victim beaten to death with hammer); *People v. Durham & Robinson*, 70 Cal. 2d 171 (1969) [449 P.2d 198] [Robinson sole capital defendant] (robbery, defendant parole escapee, victim police officer); *People v. Aikens*, 70 Cal. 2d 369 (1969) [450 P.2d 258] (rape and robbery, double murder, prior murder, court trial); *People v. Varnum*, 70 Cal. 2d 480 (1969) [450 P.2d 553] (robbery); *People v. Hill*, 70 Cal. 2d 678 (1969) [452 P.2d 329] (robbery, rape, and sodomy upon pregnant victim); *People v. McGautha*, 70 Cal. 2d 770 (1969) [452 P.2d 650] (robbery, prior murder) [the case at bar]; *People v. Tolbert*, 70 Cal. 2d 790 (1969) [452 P.2d 661] (rape and sodomy); *People v. Coogler*, 71 Cal. 2d ....., 71 A.C. 165, *modified*, 71 A.C. 359 (1969) [454 P.2d 686] (robberies, double murders); *People v. Nye*, 71 Cal. 2d ...., 71 A.C. 376 (1969) [455 P.2d 395] (robbery and rape, exceptional heinousness—victim stabbed 37 times); *People v. Mabry*, 71 Cal. 2d ...., 71 A.C. 448 (1969) [455 P.2d 759] (burglary, victim police officer, several prior felony convictions including prison escape); *People v. Miller*, 71 Cal. 2d ....., 71 A.C. 477 (1969) [455 P.2d 377] (commission of sexual acts upon eight-year-old victim); *People v. Pike*, 71 Cal. 2d ....., 71 A.C. 617 (1969) [455 P.2d 776] (robbery, victim police officer); *People v. Robles*, 71 Cal. 2d ....,

71 A.C. 966 (1969) [458 P.2d 67] (robbery and premeditation); *People v. Floyd & Milton*, 1 Cal. 3d 694 (1970) [464 P.2d 64] (robbery of municipal bus driver, two capital defendants); *People v. King*, 1 Cal. 3d 791 (1970) [463 P.2d 753] (robbery); *People v. Terry*, 2 Cal. 3d 362, *modified*, 2 Cal. 3d 556a (1970) [466 P.2d 961] (robbery and exceptional heinousness—pharmacist stabbed 17 times with scissors and shot four times).

B. *Direct Appeals Reversed as to Death Penalty, Conviction, or Both*

People v. Bassett, 69 Cal. 2d 122 (1968) [443 P.2d 777] (premeditation, double murder); *People v. McDowell*, 69 Cal. 2d 737 (1968) [447 P.2d 97] (robbery); *People v. White*, 69 Cal. 2d 751 (1968) [446 P. 2d 993] (robbery and rape); *People v. Chacon & Noah*, 69 Cal. 2d 765 (1968) [447 P.2d 106] (near-fatal assault by prisoners serving life terms, numerous prior felonies committed by each of the two capital defendants, including murder by one and assault with a deadly weapon on a police officer by another); *People v. Anderson*, 70 Cal. 2d 15 (1968) [447 P.2d 942] (premeditation, sexual acts upon ten-year-old female victim); *People v. Risenhoover*, 70 Cal. 2d 39 (1968) [447 P.2d 925] (robbery and premeditation); *People v. Bradford*, 70 Cal. 2d 333 (1969) [450 P.2d 46] (premeditation and exceptional heinousness—death caused by pouring sulphuric acid on victim); *People v. Terry*, 70 Cal. 2d 410 (1969) [454 P.2d 36] (robbery, victim police officer); *People v. Teale*, 70 Cal. 2d 497 (1969) [450 P.2d 564] (robbery); *People v. Sanchez*, 70 Cal. 2d 562 (1969) [451 P.2d 74] (murder of civilian prison employee by prisoner serving life term);

People v. Fain, 70 Cal. 2d 588 (1969) [451 P.2d 65] (rape and sex perversion, with prior rape and prior attempted rape); *People v. Morse*, 70 Cal. 2d 711 (1969) [452 P.2d 607] (premeditation, while awaiting sentencing on retrial for two capital murders defendant killed fellow prisoner who owed him cigarettes); *People v. Osuna & Gorman*, 70 Cal. 2d 759 (1969) [452 P. 2d 678] (robbery, two capital defendants); *People v. Goodridge*, 70 Cal. 2d 824 (1969) [452 P.2d 637] (rape and sodomy, committed probably after victim's death, 107 stab wounds); *People v. Graham & Shepard*, 71 Cal. 2d ....., 71 A.C. 320 (1969) [455 P.2d 153] [Shepard only capital defendant] (robbery); *People v. O'Brien*, 71 Cal. 2d ....., 71 A.C. 415, *modified*, 71 A.C. 791 (1969) [456 P.2d 969] (robbery, victim police officer); *People v. Vaughn*, 71 Cal. 2d ....., 71 A.C. 423 (1969) [455 P.2d 122] (assault on prison guard by prisoner serving life sentence, defendant having previously killed three fellow prisoners); *People v. Quicke*, 71 Cal. 2d ....., 71 A.C. 521 (1969) [455 P.2d 787] (premeditation and exceptional heinousness —subsequent sexual intercourse with victim's corpse); *People v. Williams*, 71 Cal. 2d ....., 71 A.C. 637 (1969) [456 P.2d 633] (robbery, strangulation); *People v. Ketchel*, 71 Cal. 2d ....., 71 A.C. 659 (1969) [456 P.2d 660] (robbery, victim police officer); *People v. Schader*, 71 Cal. 2d ....., 71 A.C. 797 (1969) [457 P.2d 841] (robbery, victim police officer); *People v. McClellan*, 71 Cal. 2d ....., 71 A.C. 831 (1969) [457 P.2d 871] (robbery, double murder); *People v. Stanworth*, 71 Cal. 2d ....., 71 A.C. 858 (1969) [457 P.2d 889] (rape, double murder of 14 and 15-year-old girls, with numerous other prior and subsequent acts of rape, sexual perversion, and robbery);

People v. Gardner, 71 Cal. 2d ....., 71 A.C. 882 (1969) [457 P.2d 575] (robbery); *People v. Washington*, 71 Cal. 2d ...., 71 A.C. 1105 (1969) [458 P.2d 479] (arson, three other murders attempted, exceptional heinousness—defendant poured gasoline into children's bedroom and lit it, 17 month-old victim dying two weeks later); *People v. Daniels & Simmons*, 71 Cal. 2d ...., 71 A.C. 1165 (1969) [459 P.2d 225] (three counts against two capital defendants of kidnaping for gain with bodily harm, each in the vicinity of a university campus and involving rape, and one involving sexual perversion; prior rapes and prior kidnaping); *People v. Coleman*, 71 Cal. 2d ...., 71 A.C. 1201 (1969) [459 P.2d 248] (robbery); *People v. Washington*, 71 Cal. 2d ....., 71 A.C. 1212 (1969) [459 P.2d 259] (robbery); *People v. Brawley & Baker*, 1 Cal. 3d 277 (1969) [461 P.2d 361] (robbery, two capital defendants); *People v. Mosher*, 1 Cal. 3d 379 (1969) [461 P.2d 659] (robbery and rape); *People v. Wilson*, 1 Cal. 3d 431 (1969) [462 P.2d 22] (premeditation, double murder); *People v. St. Martin*, 1 Cal. 3d 524 (1970) [463 P.2d 390] (fatal assault on prisoner by another prisoner serving a life term for a previous murder and robbery); *People v. Bandhauer*, 1 Cal. 3d 609 (1970) [463 P.2d 408] (robbery); *People v. MacPherson*, 2 Cal. 3d 109 (1970) [465 P.2d 17] (robbery); *People v. Robles*, 2 Cal. 3d 205 (1970) [466 P.2d 710] (murder, premeditated and fatal assault on prisoner by another prisoner serving a life term for prior murder and assault with intent to commit murder); *People v. Tidwell (William)*, 3 Cal. 3d 62 (1970) [..... P.2d .....] (robbery, triple murder); *People v. Tidwell (Robert)*, 3 Cal. 3d 82 (1970) [..... P.2d .....] (robbery, triple murder).

C. *Writs Denied After Issuance of Order to Show Cause*

None.

D. *Writs Granted Setting Aside Death Penalty, Conviction, or Both*

In re Anderson & Saterfield, 69 Cal. 2d 613 (1968) [447 P.2d 117] (as to Anderson: robbery, and attempt to kill two police officers and a fourth victim; as to Saterfield: premeditation, double murder, prior murder conviction); *In re Mathis,* 70 Cal. 2d 467 (1969) [450 P.2d 290] (robbery); *In re Morse,* 70 Cal. 2d 702 (1969) [452 P.2d 601] (premeditation, double murder); *In re Arguello,* 71 Cal. 2d ....., 71 A.C. 13 (1969 [452 P.2d 921] (robbery, exceptional heinousness—82-year-old victim beaten to death with brick and hammer); *In re Eli,* 71 Cal. 2d ....., 71 A.C. 227 (1969) [454 P.2d 337] (rape); *In re Seiterle,* 71 Cal. 2d ...., 71 A.C. 722 (1969) [456 P.2d 129] (robbery, double murder); *In re Hillery,* 71 Cal. 2d ....., 71 A.C. 896 (1969) [457 P.2d 565] (rape of 15-year-old victim); *In re Hill & Saunders,* 71 Cal. 2d ....., 71 A.C. 1039 (1969) [458 P.2d 449] (robbery, second murder attempted, two capital defendants); *In re Tahl,* 1 Cal. 3d 122, *modified,* 1 Cal. 3d 403b (1969) [460 P.2d 449] (robbery, double murder, subsequent murder, subsequent attempt to kill fourth person, and statement of intention to kill fifth person); *In re Kemp,* 1 Cal. 3d 190 (1969) [460 P.2d 481] (rape, with rapes of two other victims); *In re Lara,* 1 Cal. 3d 486 (1969) [462 P.2d 380] (robbery); *In re Roberts,* 2 Cal. 3d 892 (1970) [471 P.2d 481] (robbery); *In re Saunders,* 2 Cal. 3d 1033 (1970) [472 P.2d ....] (robbery, second murder attempted).